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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

Before The Honorable YVONNE GONZALEZ ROGERS, Judge

EPIC GAMES, INC.,)	
)	
Plaintiff,)	NO. C-20-5640 YGR
)	
vs.)	Monday, May 3, 2021
)	
APPLE, INC.,)	Oakland, California
)	
Defendant.)	BENCH TRIAL
)	
APPLE, INC.,)	
)	
Counterclaimant,)	
)	
vs.)	
)	
EPIC GAMES, Inc.,)	
)	
Counter-Defendant.)	
)	

REPORTER'S TRANSCRIPT OF PROCEEDINGS

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(Appearances continued.)

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TRANSCRIPT PRODUCED BY COMPUTER-AIDED TRANSCRIPTION

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1 MONDAY, MAY 3, 2020

8:44 a.m.

2 P R O C E E D I N G S

08:44:14 3 **THE COURT:** Good morning, everyone.

08:44:16 4 **THE CLERK:** You may be seated.

08:44:17 5 **THE COURT:** You sound better than my jurors when I
08:44:20 6 call jurors in. In fact, I usually have a little joke that I
08:44:24 7 use with them because they are all so unanimated having to be
08:44:29 8 here at 7:00 o'clock in the morning.

08:44:32 9 Let's go ahead and call your case. We'll get started.
08:44:35 10 Apologies to everyone for the delay. But I think we've got
08:44:39 11 the phone lines figured out so this will not be a problem in
08:44:43 12 the future.

08:44:44 13 Ms. Stone, the case.

08:44:46 14 **THE CLERK:** All right. Calling Civil Action 20-5640
08:44:52 15 Epic Games versus Apple Inc.

08:44:54 16 Counsel, please state your appearances.

08:44:57 17 **MS. FORREST:** Good morning, Your Honor. Katherine
08:44:58 18 Forrest for Epic Games.

08:45:01 19 **THE COURT:** Good morning.

08:45:01 20 **MR. BORNSTEIN:** Good morning. Gary Bornstein, also
08:45:03 21 for Epic Games.

08:45:04 22 **THE COURT:** Good morning.

08:45:05 23 **MR. EVEN:** Good morning. Yonatan Even, also for Epic
08:45:08 24 Games.

08:45:08 25 **THE COURT:** Good morning.

08:45:09 1 **MS. MOSKOWITZ:** Good morning, Your Honor. Lauren
08:45:10 2 Moskowitz for Epic Games.

08:45:11 3 **THE COURT:** Good morning.

08:45:12 4 **MS. FORREST:** And, your Honor, I would like to
08:45:14 5 introduce you to our client, Tim Sweeney.

08:45:17 6 **THE COURT:** Good morning.

08:45:17 7 And then I understand it is a small group of people we
08:45:20 8 have here, so why don't you introduce your staff as well so I
08:45:24 9 know who they are.

08:45:26 10 **MS. FORREST:** Certainly. Your Honor, we have our hot
08:45:28 11 seat operator, Jason Rudd.

08:45:32 12 **THE COURT:** Jason R-U-D-D?

08:45:34 13 **MR. RUDD:** Yes.

08:45:34 14 **THE COURT:** Good morning, sir.

08:45:34 15 **MS. FORREST:** And he is the only other additional
08:45:36 16 person from our team, Your Honor.

08:45:38 17 **THE COURT:** Okay.

08:45:38 18 **MR. DOREN:** Good morning, Your Honor. Richard Doren
08:45:41 19 on behalf of Apple. Joining me here today is Rachel Brass
08:45:46 20 from Gibson, Dunn & Crutcher; Karen Dunn from Paul Weiss.

08:45:50 21 I would like to represent our corporate representative,
08:45:50 22 Mr. Philip Schiller, and the Apple's general counsel Ms. Kate
08:45:56 23 Adams.

08:45:58 24 **THE COURT:** Okay. Good morning.

08:45:58 25 **MR. DOREN:** And joining in this morning our hot seat

08:45:59 1 operator is Mr. Matt Spalding.

08:46:00 2 And, Your Honor, we just have -- we have two other people
08:46:03 3 in the courtroom until we are sure there are no housekeeping
08:46:07 4 matters, and then we will be down to our six immediately.

08:46:10 5 **THE COURT:** And who are those?

08:46:12 6 **MR. DOREN:** Ms. Betty Yang.

08:46:14 7 **THE COURT:** Good morning.

08:46:14 8 **MR. DOREN:** And Jessica Phillips from Paul Weiss.

08:46:20 9 **THE COURT:** Okay. Good morning.

08:46:22 10 And then I think we have a couple more people here in the
08:46:28 11 courtroom. From the media, I think we have someone from *The*
08:46:33 12 *New York Times*, is it?

08:46:35 13 **MS. GRIFFITH:** Yes. Hi.

08:46:37 14 **THE COURT:** Okay. Good morning.

08:46:38 15 And then there is one other person.

08:46:45 16 And then we have Vicki Behringer, good to you see again.

08:46:54 17 **MS. BEHRINGER:** Good to see you.

08:46:56 18 **THE COURT:** And one of the attorneys from the
08:46:58 19 plaintiff's class?

08:46:58 20 **MR. RODRIGUEZ:** That's correct, Your Honor. Alberto
08:46:59 21 Rodriguez.

08:47:02 22 **THE COURT:** Okay. Good morning.

08:47:03 23 Well, it's really wonderful to see everybody live. I know
08:47:08 24 this has been quite the adventure, not only of the year but
08:47:13 25 this case.

08:47:13 1 I do want to just start by complimenting all of you for
08:47:18 2 the hard work. And as you can see, this is just a small part
08:47:23 3 of your team. You have big teams. And I have a little team.
08:47:29 4 So everything that you have done to make all of this massive
08:47:34 5 amount of information accessible to us is quite appreciated.
08:47:39 6 Your professionalism is appreciated.

08:47:42 7 I know that these are difficult issues and, you know, the
08:47:49 8 concerns of both sides are significant. But that doesn't mean
08:47:54 9 as professionals, and I'm talking now to the lawyers not the
08:47:57 10 clients, that does not mean as professionals that we can't be
08:48:01 11 professional, that we can't get along, that reasonable people
08:48:05 12 can't disagree. And, you know, frankly, as many of you know,
08:48:07 13 that is not always the case when we have litigators in front
08:48:12 14 of us.

08:48:12 15 So I have talked to Judge Hixson, I've talked to
08:48:17 16 Judge LaPorte, and they have all commented that your
08:48:24 17 professionalism has been terrific, and it is -- it's
08:48:29 18 appreciated.

08:48:30 19 So our schedule today will be a little bit different given
08:48:34 20 the delay, but -- and you've got openings, I understand. I
08:48:39 21 don't want to cut you off in the middle of that. So we will
08:48:45 22 take breaks at time when it seems appropriate.

08:48:47 23 I also think -- I tell my law clerks, it usually takes a
08:48:51 24 couple of days to get into the swing of trial and everything
08:48:54 25 else. So we'll manage for a couple of days and figure out how

08:48:59 1 to make things work efficiently. I hope that once in a while,
08:49:03 2 even though we are dealing with high stakes, if we laugh once
08:49:09 3 in a while that may not be a bad thing. It keeps tensions
08:49:13 4 down. You are welcome to laugh if I make a joke. I know I am
08:49:19 5 not funny, but everybody says judge's jokes are always funny.
08:49:19 6 I have children to keep me honest.

08:49:23 7 So in any event, welcome. I know some of you have come
08:49:27 8 from out of town. I hope you are enjoying our good weather.
08:49:30 9 When you first came, you did not bring the good weather for
08:49:34 10 you, but now that we are here in trial, I am glad it is not
08:49:37 11 raining and storming and cold outside for you.

08:49:37 12 We do have a jury trial starting later in the -- there
08:49:40 13 will be jury selection later in the week. I will let you know
08:49:44 14 because the lines outside will be longer, but I will let you
08:49:47 15 know when you can expect that so you can make arrangements.

08:49:52 16 I did take a picture of all your binders.

08:49:55 17 So anyway. With that, why don't we see if there is
08:50:03 18 anything that we need to deal with right now before opening
08:50:08 19 statements. I'll always start by asking you for your list of
08:50:14 20 issues. I've got my own list.

08:50:16 21 We'll -- in general I like to have the evidence portion of
08:50:21 22 the proceedings start on time so we may not get to everything
08:50:26 23 in our morning session. But let me see, if anything, you have
08:50:31 24 on your list and then I can share with you what is on my list.

08:50:35 25 Ms. Forrest, anything from the plaintiffs?

08:50:37 1 **MS. FORREST:** Yes. Your Honor, the parties have
08:50:38 2 conferred and we actually don't have any evidentiary
08:50:41 3 housekeeping issues for Your Honor this morning. I have one
08:50:44 4 logistical issue, which is Ms. Dunn and I were wondering
08:50:48 5 whether or not we would be able to use these face shields when
08:50:52 6 we are presenting our openings, if that would be acceptable.

08:50:56 7 **THE COURT:** Okay. That's fine.

08:50:57 8 **MS. FORREST:** Thank you, Your Honor.

08:50:58 9 Also we want to just do a quick -- unfortunately, a sound
08:51:01 10 issue when we were going back and forth with the lines, the
08:51:05 11 sound cut off. So if we can do that for one second.

08:51:09 12 And then lastly, Your Honor, we have copies of the slides
08:51:12 13 that we're going to be using during the opening if Your Honor
08:51:15 14 would like me to hand those to the clerks.

08:51:19 15 **THE COURT:** One of the clerks can grab them.

08:51:22 16 All right. I do have, I think a couple of housekeeping --
08:51:26 17 well, Ms. Dunn, anything from your side?

08:51:29 18 **MS. DUNN:** No, Your Honor.

08:51:30 19 **THE COURT:** Okay. So the docket number 498, which is
08:51:36 20 the stipulation with respect to the documents submitted with
08:51:41 21 the deposition designations, that is -- now that we have
08:51:44 22 started trial, that is granted. So all of those documents
08:51:49 23 which are on that particular docket number are now admitted
08:51:54 24 into evidence.

08:51:58 25 Docket number 538, the stipulation with the proposed order

08:52:01 1 with respect to trial procedures, that is granted.

08:52:07 2 And then docket number 563, the stipulation between the
08:52:11 3 parties with respect to sealed material, that is granted.

08:52:18 4 There are a number of other stipulations. With respect to
08:52:24 5 the expert testimony, I do not intend to admit written direct
08:52:31 6 expert testimony until the date of that expert's testimony.
08:52:36 7 So -- and because of your objections, and with respect to some
08:52:42 8 of that, I do want to have some discussion with you, but I
08:52:45 9 think we can wait. It is time to get started as far as I'm
08:52:49 10 concerned. So those we will discuss.

08:52:54 11 As you know, we tried to address the urgent motions to
08:52:58 12 seal over the weekend, and in due course we will deal with all
08:53:02 13 of the others.

08:53:04 14 Okay. That's what I had on my list that needed to be
08:53:09 15 dealt with in short order.

08:53:11 16 So why don't you go ahead, Ms. Forrest, and do your sound
08:53:19 17 check and then we can get started.

08:53:21 18 **THE CLERK:** I want to test and make sure we have
08:53:23 19 sound over here.

08:53:27 20 (Pause in the proceedings.)

08:53:29 21 **MS. FORREST:** Let me set up while you are doing that.

08:54:59 22 (Pause in the proceedings.)

08:56:43 23 **THE COURT:** You may proceed.

08:56:45 24 **MS. FORREST:** Thank you.
08:56:45 25

OPENING STATEMENT - FORREST

OPENING STATEMENT

MS. FORREST: Good morning, Your Honor. And may it please the Court. Katherine Forrest for Epic Games.

The evidence will show that Apple crafted its iPhones to be a pinnacle of design, housing an equally carefully designed ecosystem. The evidence will also show that at the heart of the ecosystem is a business model that plays out in homes across the world.

Consumers using Apple's Mac computers or Windows PC can download apps from developers of their own choosing, through whatever means they prefer without anyone paying anything to the owner of the operating system for the initial download of an app or for in-app purchases made later on.

But when they pick up their iPhones, users enter a different world, one in which they are locked into a closed platform where they may only download apps from Apple, and each and every time they make an in-app purchase for use in the app, a 30 percent tax is imposed.

The evidence will show that smartphones, such as the iPhone, are essential to our lives. It is time, indeed past time, to open the iOS platform to innovation, choice, and lower prices. The market will not self-correct. It requires the intervention of a force more powerful than even the largest company in the world have ever seen: Our justice system.

OPENING STATEMENT - FORREST

08:58:05 1 Epic is not suing for damages. Epic is not suing for a
08:58:09 2 special deal. Epic is suing for change. As Epic has said
08:58:14 3 repeatedly to Apple, it is suing for change, not just for
08:58:16 4 itself but for all developers.

08:58:18 5 The evidence will show that Apple's conduct has resulted
08:58:21 6 in the monopolization of two markets: The iOS app
08:58:26 7 distribution market by blocking the distribution of iOS apps
08:58:30 8 outside the App Store, and the iOS In-App Payment Solutions
08:58:34 9 Market by mandating use of Apple's IAP for digital goods.

08:58:39 10 Apple has engaged in separate monopolistic conduct in each
08:58:43 11 market that has led to specific anticompetitive effects in the
08:58:47 12 form of higher prices, reduced innovation, less choice, and
08:58:53 13 reduced customer service offerings.

08:58:55 14 The evidence will show that Apple acquired its monopoly
08:59:01 15 positions by building up the very walled garden that it refers
08:59:03 16 to in its findings of fact as the secret to its various
08:59:06 17 procompetitive successes and maintaining it with a series of
08:59:09 18 business decisions and policies.

08:59:11 19 Another name for the walled garden is the iOS ecosystem.
08:59:16 20 An ecosystem that the evidence will show locks in consumers
08:59:20 21 and developers through a series of dependencies and
08:59:23 22 restrictions that prevent switching to competitive
08:59:27 23 alternatives.

08:59:27 24 Consumers are locked in by switching costs, and developers
08:59:30 25 lured in with the promise of a simple business proposition.

OPENING STATEMENT - FORREST

08:59:35 1 Developers would use their skills to innovate and make the iOS
08:59:39 2 ecosystem attractive to users, and Apple would give
08:59:43 3 essentially all app revenues to developers, keeping for itself
08:59:47 4 only what it needed to cover the operation of the App Store.
08:59:51 5 And Apple would monetize the ecosystem by selling iPhones.

08:59:55 6 But Apple reneged and developers learned the truth too
09:00:00 7 late. Apple's promise that "there is an app for that"
09:00:02 8 attracted millions of users to its ecosystem and network
09:00:06 9 effects made Apple's user base into an essential must-have
09:00:10 10 once developers' businesses became dependent on reaching them.

09:00:13 11 The evidence will show that shortly after Apple succeeded
09:00:17 12 in building its walled garden and luring enough developers and
09:00:20 13 users in, a tipping point occurred and users and developers
09:00:25 14 alike became trapped inside. The garden gate was closed, the
09:00:31 15 lock turned.

09:00:31 16 Network effects and consumer switching costs created the
09:00:34 17 lock, and by imposing on developers technical and ever-more
09:00:38 18 onerous contractual restrictions, Apple threw away the key.

09:00:42 19 As all stories do, this story has a beginning. And it
09:00:47 20 begins when Apple developed what, in its own words, it called
09:00:51 21 "the plan." The evidence will show that this reference to the
09:00:55 22 plan was at a time when Apple released tools to allow
09:01:00 23 third-party developers to write apps but intentionally
09:01:04 24 withheld them the freedom to distribute them. Apple's plan
09:01:07 25 was to lock users in and prevent switching away from the iOS

OPENING STATEMENT - FORREST

09:01:11 1 ecosystems.

09:01:12 2 The Court will see documents and hear testimony from Apple
09:01:15 3 personnel who developed and implemented the plan. You will
09:01:18 4 hear from Epic witnesses, including Tim Sweeney, Epic's CEO;
09:01:24 5 Andrew Grant, Epic's engineering fellow; Matt Weissinger,
09:01:24 6 Epic's vice president of marketing; Thomas Ko, Epic's senior
09:01:34 7 director, head of online business strategy and operations; and
09:01:38 8 Steve Allison, vice president and general manager of the Epic
09:01:43 9 Games Store.

09:01:44 10 They represent a company that finally said enough to
09:01:44 11 Apple's monopolistic conduct and have dedicated the enormous
09:01:51 12 resources necessary to take on a fight with the largest
09:01:53 13 company in the world. Epic dubbed the extraordinary process
09:01:59 14 of taking on literally the world's largest company Project
09:02:01 15 Liberty.

09:02:02 16 The evidence will show that Epic stands behind the
09:02:06 17 decisions it made every step of the way. Epic is far from the
09:02:09 18 only unhappy Apple developer and distributor. Multiple others
09:02:15 19 just like Epic recognize Apple's conduct and iOS app
09:02:18 20 distribution and In-App Payment Solutions as anticompetitive.

09:02:22 21 The Court has already read the testimony from Match and
09:02:25 22 will hear testimony from several third parties, including Down
09:02:30 23 Dog's Ben Simon, Nvidia's Aashish Patel, and Microsoft's Lori
09:02:35 24 Wright, who will speak to their experiences dealing with
09:02:39 25 Apple's app distribution policies and practices.

OPENING STATEMENT - FORREST

09:02:42 1 How did Apple implement its plan? Carefully and
09:02:47 2 methodically brick by brick. The documents and testimony will
09:02:51 3 show that early on in the history of iOS and the App Store,
09:02:54 4 Apple understood what it needed to do to lock users in and
09:02:58 5 prevent switching.

09:02:59 6 Let's now look at some of the evidence the Court will see
09:03:02 7 showing the construction of the walled garden. Let's start
09:03:06 8 with an exhibit that dates back to 2008 in which Steve Jobs
09:03:10 9 tells a high-level Apple engineering executive, Scott
09:03:13 10 Forstall, that Apple should use the license agreement to build
09:03:17 11 in restrictions that would require use of an Apple app in
09:03:20 12 order to avoid competitors.

09:03:22 13 In the next exhibit, from 2010, we see Phil Schiller, one
09:03:28 14 of Apple's top executives, and here in the courtroom today,
09:03:29 15 suggesting to Steve Jobs and others at Apple that it would,
09:03:33 16 quote, be smart to build the App Store as far into the OS as
09:03:36 17 possible in order to, quote, push Apple's advantage. In this
09:03:43 18 next exhibit, another one of Apple's top executives writes to
09:03:47 19 Tim Cook, Apple's current CEO, and Phil Schiller, describing
09:03:50 20 how to, quote, "hook," end quote, users into to the Apple
09:03:55 21 ecosystems. Right after discussing how to hook users into the
09:03:58 22 ecosystem, he states that, quote, "the more people use our
09:04:03 23 stores, the more likely they are to buy additional Apple
09:04:06 24 products," end quote.

09:04:07 25 And he ends by setting out part of their lock-in formula.

OPENING STATEMENT - FORREST

09:04:11 1 In his words, quote, who leaves Apple products once they've
09:04:16 2 bought apps, music, movies, et cetera?

09:04:18 3 In this next exhibit, we see Phil Schiller now writing to
09:04:22 4 both Eddy Cue and copying Tim Cook, acknowledging that in his
09:04:26 5 words, quote, "life is better when you have many of our
09:04:30 6 devices -- Mac, iPad, iPhone, et cetera -- all working
09:04:34 7 together with the apps and iCloud ecosystem," end quote.
09:04:38 8 This group understood what it took to build the ecosystem.

09:04:41 9 In this next exhibit, Eddy Cue writes to the Apple
09:04:43 10 executives that they should let him know if, in his words,
09:04:47 11 quote, "you need any data to make the case for the ecosystem,"
09:04:50 12 end quote.

09:04:52 13 This was an executive proselytizing for the ecosystem.

09:04:56 14 In this next exhibit, one of Apple's highest engineers,
09:04:59 15 Craig Federighi, asks Eddy Cue, copying Phil Schiller and Tim
09:05:06 16 Cook, how, in his words, we would make switching to iMessage
09:05:10 17 from WhatsApp, compelling to masses of Android users who don't
09:05:14 18 have a bunch of iOS friends, end quote.

09:05:16 19 This is the engineer asking for essentially business
09:05:18 20 advice from some of Apple's highest executives. Mr. Federighi
09:05:24 21 continues that he is, quote, "concerned that iMessage on
09:05:27 22 Android would simply serve to remove an obstacle to iPhone
09:05:31 23 families giving their kids Android phones," end quote.

09:05:34 24 This exhibit is part of the evidence showing caucusing on
09:05:37 25 how to use an app, iMessage, to create and keep ecosystem

OPENING STATEMENT - FORREST

lock in.

In this next exhibit, executives, including Phil Schiller, Tim Cook, and Eddy Cue, openly discuss a statement from a third party that iMessage is the number one most difficult app to leave and that iMessage creates serious lock in. One Apple executive acknowledges, quote, "we hear this a lot," end quote. And Schiller tells Cook that he thinks moving iMessage to Android will hurt Apple more than it helps them, and that this email from the third party illustrates why.

In this next exhibit we see Steve Jobs setting out the strategy that created the lock in. He said that Apple was further along than Google or Microsoft in creating lock in, and that Apple would, quote, tie all of our products together so we further lock customers into our ecosystem.

In this next exhibit, the same top engineer we have already seen so involved in creating the walled garden, Craig Federighi, discusses adding features that, in his words, quote, make our platform more sticky.

And in this last exhibit that I will show during this opening on the construction of the walled garden, we see two Apple executives copying Tim Cook on a message in which they plainly acknowledge that, in their words, quote, "given the sheer size and stickiness effect on the ecosystem," end quote, Air Pods, a new Apple product, will now play a role.

At the core of the walled garden is the iPhone's operating

OPENING STATEMENT - FORREST

09:07:07 1 system called iOS. Now, to be clear, the garden could have
09:07:12 2 had a door; there was no reason that it needed to be closed;
09:07:15 3 it was artificially walled in.

09:07:17 4 The evidence will show that when the iPhone launched,
09:07:20 5 Apple already had an open OS that was secure and safe:
09:07:25 6 macOS. But macOS is not a walled garden. It allows
09:07:31 7 consumers to download apps from websites securely. Apple even
09:07:35 8 improved on the inherent safety of macOS by introducing an
09:07:41 9 iOS strict sandboxing of apps, a feature that keeps each app
09:07:46 10 in its own sandbox. So a rogue app can't invade the OS or
09:07:50 11 interact with other apps.

09:07:52 12 Apple's plan took the existing macOS and used it as the
09:07:57 13 technical base for iOS. But Apple then significantly
09:08:01 14 restricted the open capabilities of macOS and also imposed
09:08:05 15 contractual restrictions, adding bricks to its iOS walled
09:08:10 16 garden and transforming the open macOS environment into a
09:08:16 17 closed iOS ecosystem that Apple completely controlled.

09:08:19 18 The evidence from the technical experts and witnesses will
09:08:22 19 show that macOS and iOS are technically similarly and there
09:08:28 20 are no technical reasons that macOS' open distribution model
09:08:32 21 cannot be used in iOS.

09:08:35 22 Apple's former senior vice president of iOS, Scott
09:08:39 23 Forstall, concedes that iOS comes from macOS, referring to
09:08:43 24 the core of what makes up iOS request as the, quote, same OS
09:08:48 25 kernel built out of the same project with the same source

OPENING STATEMENT - FORREST

09:08:53 1 files that we use on macOSX.

09:08:55 2 The evidence will show that when Apple was making
09:08:58 3 decisions to constrain app distribution on iOS, it was not
09:09:02 4 making a technical decision but a policy one. The evidence
09:09:07 5 will not reveal some terrible failing in macOS that iOS has
09:09:12 6 cured. Rather, in making decisions about the distribution of
09:09:15 7 apps on iOS, Apple was building its walled garden with policy
09:09:21 8 decisions.

09:09:21 9 Here is an exhibit from 2007 that demonstrates precisely
09:09:26 10 this point. This exhibit is concerned with, in part, the
09:09:29 11 distribution of third-party apps. Apple requires signing apps
09:09:34 12 in order for them to be distributed through the App Store, but
09:09:38 13 as the authors of this exhibit make clear, signing itself does
09:09:42 14 not imply a specific distribution method. And in their words,
09:09:46 15 quote, "it's left as a policy decision as to whether
09:09:50 16 Apple-signed applications are posted to the online store, or
09:09:54 17 we allow developers to distribute them on their own," end
09:09:59 18 quote.

09:09:59 19 To justify its walled garden, Apple needed to convince
09:10:03 20 those locked in and those locked out that the wall served some
09:10:07 21 higher purpose, something more than profitability. And so
09:10:11 22 Apple security justification was born.

09:10:15 23 The evidence will show that just as with its sibling,
09:10:18 24 macOS, security resides at the operating system level for
09:10:23 25 iOS, not at the level of the App Store. Ignoring the fact

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09:10:28 1 that Apple has repeatedly referred to the open distribution
09:10:32 2 macOS environment as a safe environment, Apple told the
09:10:36 3 world that only its absolute control over the App Store and
09:10:41 4 in-app purchasing could keep iOS users safe.

09:10:47 5 Let's take a look at the words of Apple's own personnel
09:10:47 6 discussing their belief in macOS security. Referring to the
09:10:52 7 macOS, one Apple document states, quote, "these security
09:10:57 8 controls provide a stable, secure platform for apps," end
09:11:01 9 quote, and that third party developers were able to deliver
09:11:04 10 hundreds of thousands of apps, quote, "all without impacting
09:11:08 11 system integrity," end quote.

09:11:10 12 Exhibits about Apple literature shown here state that apps
09:11:13 13 from the Mac App Store can be downloaded, quote, "worry free,"
09:11:18 14 end quote, and that Mac hardware and software are designed to,
09:11:22 15 quote, "run apps more securely," end quote.

09:11:26 16 Finally, Apple's Ron Okamoto, the vice president of
09:11:30 17 developer relations, testified that he did not think it was
09:11:33 18 unsafe or unsecure to use a Mac.

09:11:37 19 You've already seen in the four hours of deposition
09:11:41 20 testimony that we previously gave to Your Honor, Apple's own
09:11:42 21 Ron Okamoto who had been at Apple in charge of working with
09:11:47 22 both Mac and iOS developers for two decades, that he had never
09:11:51 23 heard anyone at Apple say that macOS is a less secure
09:11:56 24 platform than iOS.

09:11:58 25 This statement is unsurprising because the evidence will

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09:12:01 1 show that the majority of the security features for macOS
09:12:07 2 reside at the operating system level. And since both iOS
09:12:10 3 and macOS share the same core design, they are both designed
09:12:15 4 to protect consumers in similar ways.

09:12:17 5 In fact, macOS has several security mechanisms that
09:12:21 6 could be implemented in iOS to provide further protection.
09:12:26 7 Apple's control over the App Store in in-app purchasing simply
09:12:29 8 does not materially add consumer protection despite the
09:12:34 9 30 percent tax that Apple extracts for these services.

09:12:38 10 Our expert will testify that the security protections in
09:12:41 11 macOS are all replicable in iOS. You can see here on this
09:12:47 12 demonstrative that Apple's Craig Federighi testified that all
09:12:51 13 the security mechanisms currently in macOS could be
09:12:57 14 replicated in iOS.

09:12:59 15 But Apple did change some things with iOS. Apple needed
09:13:01 16 to convince developers to come in behind the wall and to stay
09:13:04 17 there. It knew that the secret to selling more iPhones was to
09:13:07 18 have a robust set of apps that would make the iPhone ever more
09:13:12 19 attractive, ever more essential to a user's life.

09:13:15 20 Here is an exhibit in which Steve Jobs makes precisely
09:13:19 21 this point. He said, quote, "our purpose in the App Store is
09:13:22 22 to have -- is to add value to the iPhone, and that free apps
09:13:26 23 do that just as well as paid apps," end quote, we love free
09:13:33 24 apps.

09:13:33 25 Apple made the early developers a bargain: Make apps for

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09:13:36 1 iOS and we won't make oodles of money off you, just enough
09:13:41 2 to run the App Store, and we will give back the rest.

09:13:43 3 Let's turn to two exhibits in which Steve Jobs himself
09:13:46 4 tells developers about this bargain. In the first of these,
09:13:49 5 Steve Jobs tells developers, quote, we don't intend to make
09:13:53 6 money off the App Store.

09:13:55 7 In this next exhibit, Steve Jobs tells a reporter that our
09:14:00 8 Apple does not expect that the App Store will be a big profit
09:14:04 9 generator, but that it will add value to the iPhone.

09:14:07 10 The iPhone had already attracted extraordinary consumer
09:14:11 11 interest, so developers had a choice: Invest in iOS by
09:14:13 12 entering into nonnegotiable, take-it-or-leave-it agreements
09:14:19 13 with Apple or forego everyone behind the iOS wall.

09:14:23 14 Here we see the sworn testimony of Ron Okamoto, that Apple
09:14:29 15 does not negotiate the terms of its agreements with
09:14:32 16 developers.

09:14:34 17 The choice seemed easy at first. Developers flocked to
09:14:38 18 iOS and made an extraordinary array of fun, creative, and
09:14:41 19 useful apps. The indirect network effects, that virtuous
09:14:46 20 cycle between users and app developers, began. Users wanted
09:14:51 21 the developers' apps, the developers wanted the users, and, of
09:14:54 22 course, Apple sold more iPhones.

09:14:59 23 As it turned out, because iPhones are expensive and
09:15:02 24 typically attract more affluent consumers, iOS users spend
09:15:07 25 more than other mobile platform users and present developers

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09:15:11 1 with an opportunity to make a return that can support yet more
09:15:15 2 innovation.

09:15:16 3 Developers used different business methods to make money
09:15:19 4 from their apps. A large number gave their apps away for
09:15:24 5 free. Some charged for their apps and some offered in-app
09:15:29 6 purchases, but all of them were useful to Apple. All built up
09:15:33 7 the application inventory that Steve Jobs had said would help
09:15:39 8 sell iPhones.

09:15:40 9 We've talked about the evidence that will show the
09:15:43 10 construction of the walled garden around app distribution, and
09:15:46 11 now I want to turn to the portion of the garden devoted to
09:15:50 12 in-app purchasing.

09:15:51 13 At first when the App Store was launched in 2008, Apple
09:15:56 14 did not require a particular payment processing solution. It
09:16:00 15 obtained value from the sheer number of apps entering the
09:16:05 16 store. More apps meant more reasons to buy an iPhone. But an
09:16:10 17 opportunity to make even more money and the App Store became
09:16:13 18 clear. Apple personnel recognized that developers could
09:16:17 19 enable in-app purchasing opportunities and Apple wanted a
09:16:23 20 piece.

09:16:23 21 Here is one exhibit that comes on two slides that
09:16:26 22 demonstrates that Apple recognized that app developers were
09:16:31 23 making in-app purchasing opportunities available, called them
09:16:35 24 a leak, and suggested making sure that Apple's terms were
09:16:39 25 adjusted to get a piece of them.

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On the first page we see that Apple recognizes that there are now game levels being sold, many for a fee. And on the next page we see Apple identifying this extra way that app developers were making money as leakage in the system, and that if this was happening Apple should make sure its licensing terms don't allow it.

In-app purchasing, or IAP, was born. Closely followed by one of the contractual restrictions at issue in this lawsuit, the requirement that app developers use IAP for sales of digital goods.

On this next slide we see the contractual provision that comes into existence. The evidence will show that Apple understood that if IAP were optional, no one would use it. Matt Fischer, head of the App Store, acknowledges this very fact in this exhibit.

Apple saw developer resistance to IAP so it, again, turned to the security excuse to justify requiring all app developers to use IAP. And, again, the evidence shows this justification simply does not fit the facts.

The evidence will show that Apple has never done a study that shows that IAP is safer than any other payment processing solutions, including Epic's own payment solution.

Over the years Apple has rejected thousands of apps that included competing payment processing solutions, and has no idea if any of them presented any security issues at all.

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09:18:13 1 Let's hear from Apple's own head of the App Store, Matt
09:18:18 2 Fischer, on this topic, first with regard to third-party
09:18:21 3 payment systems generally.

09:18:23 4 (Videotape was played.)

09:18:23 5 Question: Are you aware of any studies that Apple
09:18:27 6 has ever done that look at whether or not there are
09:18:31 7 any security issues if any game company was to offer
09:18:37 8 an alternative payment processing method, other than
09:18:43 9 IAP for those digital goods?

09:18:45 10 Answer: I don't recall seeing a study like what
09:18:49 11 you're describing.

09:18:53 12 **MS. FORREST:** And next we will hear from Matt,
09:18:54 13 Mr. Fischer, with regard to Epic's direct payment system
09:18:59 14 specifically.

09:18:59 15 (Videotape was played.)

09:18:59 16 Question: Are you familiar with any study that Apple
09:19:02 17 has done or work that Apple has done to determine
09:19:05 18 whether Epic's alternative payment processing system
09:19:09 19 had any security issues?

09:19:10 20 Answer: No, I'm not familiar with any study that was
09:19:15 21 done regarding the Epic payment system.

09:19:22 22 **MS. FORREST:** The evidence will show that Apple
09:19:25 23 picked and chose which apps needed to have its proprietary
09:19:27 24 purchasing solution and which could implement an alternative
09:19:29 25 solution.

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09:19:31 1 Apps that sold digital goods consumed within the app
09:19:34 2 required IAP. Apps that sold physical goods did not.

09:19:37 3 Apps that sold subscriptions did, but apps that sold
09:19:41 4 certain personal experiences did not.

09:19:43 5 The security risks associated with purchasing were no
09:19:48 6 different. The Apple business choice was. The testimony will
09:19:51 7 show that Apple performed not a single study that compared the
09:19:55 8 security of its solution to any other, yet justified IAP as
09:19:59 9 necessary to protect the consumer. Security had nothing to do
09:20:03 10 with it.

09:20:04 11 Once Apple began to require the implementation of IAP in
09:20:08 12 2009, it needed to decide how much to charge. Its choice of
09:20:13 13 30 percent was unattached to the cost of the tools, services,
09:20:18 14 and support that it gives developers. The Court has already
09:20:21 15 seen, in the four hours of deposition testimony that we have
09:20:25 16 already provided, Mr. Cue state that he and Steve Jobs
09:20:30 17 primarily decided the commission level and that he cannot
09:20:33 18 recall costs playing a specific role in that decision.

09:20:38 19 Apple's director of business management of the App Store,
09:20:40 20 Carson Oliver, confirms this. In response to a question about
09:20:45 21 whether he can recall any discussion about costs in connection
09:20:48 22 with setting the commission structure, he says he does not.

09:20:53 23 And you will hear that when the decision was made in 2011
09:20:57 24 to add on more commissions to charge users who subscribe to
09:21:02 25 apps, the level 30 percent was simply maintained.

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09:21:07 1 Make no mistake about it, the evidence will show that this
09:21:10 2 change for subscriptions was a price increase to developers.
09:21:15 3 Apple's repeated statements that it has never increased its
09:21:18 4 prices is false.

09:21:19 5 Prior to 2009, developers did not have to pay Apple
09:21:24 6 anything for in-app purchases and after 2009 they did. Prior
09:21:28 7 to 2011, they did not have to pay 30 percent for
09:21:32 8 subscriptions. After 2011, they did.

09:21:36 9 And not only for the first in-app purchase or the first
09:21:40 10 subscription sign up, but for each and every in-app purchase
09:21:45 11 and subscription renewal thereafter in perpetuity.

09:21:48 12 Again, no study of costs was ever done in setting the
09:21:52 13 commission. In this case, Apple asserts that its 30-percent
09:21:56 14 commission rate is just industry standard. But the evidence
09:21:58 15 that the Court will hear from third parties, documents, and
09:22:03 16 witnesses, will demonstrate otherwise.

09:22:06 17 Among other reasons, unlike Apple, other platform owners
09:22:11 18 engage in negotiation. After years of back and forth from
09:22:15 19 developers on Apple's new subscription commission complaining
09:22:19 20 that there was no basis for Apple to take additional
09:22:23 21 commissions on subscription renewals year after year, Apple
09:22:27 22 cut the level for renewal to 15 percent in year two, not
09:22:32 23 10 percent, not 8 percent, not 5 percent, and not zero.
09:22:35 24 Apple's choice was based on policy and had nothing to do with
09:22:39 25 costs or security.

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09:22:40 1 There's a name for businesses that set prices without
09:22:43 2 regard to costs: Monopolists.

09:22:45 3 What happens next? Did the plan succeed? It did. The
09:22:52 4 evidence will show the plan succeeded beyond anyone's wildest
09:22:55 5 expectations. In 2008 Steve Jobs knew that the App Store had
09:23:00 6 succeeded beyond anything Apple had contemplated. As he said,
09:23:03 7 its growth was, quote, "off the charts."

09:23:06 8 By 2009 one of Apple's highest level executives, Eddy Cue,
09:23:10 9 acknowledged that the App Store was already profitable. As
09:23:14 10 Mr. Cue states in this exhibit, quote, "we are definitely
09:23:17 11 making money," end quote.

09:23:18 12 The evidence will show in 2011, one of Apple's other
09:23:23 13 highest-level executives, mused on whether the 30 percent
09:23:27 14 would last forever. Would it last beyond when Apple started
09:23:31 15 to make a billion dollars a year from the App Store?

09:23:34 16 But remember the deal that Steve Jobs had told developers
09:23:38 17 about in 2008, that Apple did not intend to make money. When
09:23:41 18 it did, not only did Apple not stop charging the 30 percent,
09:23:46 19 but it started to add more ways to charge developers.

09:23:50 20 As I've said, in 2009, it added IAP. In 2011 it began to
09:23:55 21 charge for subscriptions. In 2016 it began to charge
09:24:00 22 developers for App Store search advertisement placement.

09:24:05 23 Apple even charges developers who need to call for
09:24:09 24 technical help more than twice a year, collecting \$99 for each
09:24:13 25 additional incident. Apple made money, lots of it.

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09:24:17 1 But unlike in 2009 when Eddy Cue was able to quickly
09:24:20 2 respond to an email as to whether the App Store was
09:24:23 3 profitable, the evidence will show that Apple started to tell
09:24:26 4 the world, as it has repeated throughout this case, and to
09:24:29 5 members of Congress, that it doesn't know what the App Store
09:24:33 6 rate of return is because it does not keep the right kind of
09:24:37 7 records.

09:24:37 8 The evidence will show that this is not true. We have
09:24:40 9 documents, long detailed PowerPoints prepared for Apple's
09:24:44 10 senior executive team that lay out the profitability of the
09:24:48 11 App Store. These are regular presentations given multiple
09:24:52 12 years in a row.

09:24:53 13 We also have App Store profitability analyses produced to
09:24:58 14 us on the very last day of fact discovery from Tim Cook's
09:25:01 15 files, and this was after he had already been deposed.

09:25:04 16 We know from these documents that the App Store has been
09:25:08 17 making a lot of money for many years. Eventually we
09:25:11 18 discovered Apple's own calculations of App Store profit
09:25:15 19 margins, nearly 75 percent in 2018 and 77.8 percent in 2019.
09:25:21 20 Our expert accountant, Mr. Barnes, even checked their work.
09:25:25 21 These margins are far, far higher than any other comparable
09:25:28 22 company in this sphere.

09:25:31 23 Let's look at one demonstrative prepared by one of our
09:25:34 24 experts, Mr. Barnes, comparing App Store profit margin to
09:25:38 25 those of other companies using publicly available data. And

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we can see here that the App Store ranges from 74.9 percent to 77.8 percent, and comparable companies range from minus 4.8 percent to a high of 29.9 percent.

Developers found themselves caught in a trap of Apple's making. As it turned out, the most prevalent flower in the walled garden was the Venus flytrap.

Developers had accepted Apple's assurances that it was not making profit from the App Store and had dedicated themselves to producing the apps that make the iPhone a must-have device. But once they committed themselves to working in the iOS ecosystem, individual app developers were in a tenuous position: Their business depended on Apple, and the nonnegotiable Apple termination provision allows Apple to terminate the developer at any time for no reason at all.

The evidence will show that the termination provision states, for instance, quote, Apple may change, suspend, or discontinue providing the services, site, and content to you at any time.

The evidence will show that Apple has continued to wield access to the iOS ecosystem as a sword against developers, not even deterred by the pendency of this lawsuit. Two months ago Apple added a retributive provision to its nonnegotiable contract with developers.

Let's look at this new take-it-or-leave-it contractual language. Quote, if, at any time, Apple determines or

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09:27:21 1 suspects that you or any developers with which you are
09:27:24 2 affiliated have engaged in, or encouraged, or participated
09:27:28 3 with other developers to engage in any suspicious, misleading,
09:27:33 4 fraudulent, improper, unlawful, or dishonest act or omission,
09:27:38 5 Apple may withhold payments due to you or such other
09:27:41 6 developers.

09:27:43 7 Apple has now placed itself in the position of acting as
09:27:47 8 the judge of whether developers are guilty by association.

09:27:51 9 The years have ticked by, and Apple has used its
09:27:54 10 app-review process to police the four corners of the walled
09:28:00 11 garden. But because Apple's process has been driven by
09:28:04 12 business model and not technology, it has both failed to
09:28:08 13 deliver on its promise of safety to consumers and on a
09:28:12 14 consistent and clear process to developers locked behind the
09:28:16 15 wall.

09:28:17 16 Apple knows that its app-review process does not provide a
09:28:21 17 safe environment tucked away behind a secure garden wall. The
09:28:25 18 evidence will show that Apple personnel have used the
09:28:29 19 following words when referring to their own app-review
09:28:32 20 process.

09:28:34 21 The evidence will show that Apple's claims of security
09:28:39 22 fall short. There is a host of evidence that demonstrates
09:28:42 23 that, from early in the App Store history until today, apps
09:28:47 24 that defraud consumers have made it through the app-review
09:28:50 25 process and have been listed in the store. Let's look briefly

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at some of the subject lines of the exhibits that the Court will see in this trial.

Scan apps and copycat apps have gotten through the process. Fishing apps have gotten through the process. Apps that have been referred to as creating dangerous situations have gotten through. Apps that have offensive content made it through.

One such app is particularly notable, a game app that involved school shootings. This was first listed in the App Store two weeks after the Parkland shooting and was only taken down when a user complained to Apple.

In fact, so many bad apps made it through the allegedly secure app-review process, that, as we can see from this exhibit, in 2017 Apple noted that more than 400,000 apps had been removed from the App Store.

But app developers were told that they were being treated the same. Here are the words of Tim Cook himself. Mr. Cook being told Congress that Apple treated every developer the same. In fact, however, Apple had created a white list of developers who received special treatment.

Developers saw the truth, and in surveys that Apple itself conducted, repeatedly complained to Apple that its app-review process was arbitrary and inconsistent. Here are just a few of the exhibits that the Court will see with the developer's own words. Developers have also complained directly to Apple

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09:30:32 1 personnel that the app-review process is arbitrary and
09:30:35 2 inconsistent. Let's again look at some of the exhibits the
09:30:39 3 Court will see in this regard.

09:30:41 4 Here we see a developer complaining of an arbitrary
09:30:44 5 decision. And here other developers complaining of
09:30:48 6 inconsistent and arbitrary App Store policies. One developer
09:30:54 7 complained that the problem it faced was existential.

09:30:58 8 The evidence will show that as a technical matter those
09:31:02 9 with expertise understand the app-review process, know that it
09:31:06 10 is not about security but about business.

09:31:09 11 Epic's expert, Dr. Mickens, will testify that third
09:31:12 12 parties can and do perform their own app review, both human
09:31:16 13 and automated. And that Apple has, in fact, acquired one of
09:31:21 14 several of these third parties to utilize their tools and
09:31:24 15 technology to assist it with its process.

09:31:27 16 The evidence will show, and Epic's expert Dr. Mickens will
09:31:33 17 testify, that the majority of security is at the OS level, and
09:31:37 18 that app review is not significantly adding to security of the
09:31:41 19 iOS platform.

09:31:43 20 The evidence through Dr. Mickens will show that a more
09:31:44 21 competitive and open distribution could be achieved, not by
09:31:50 22 turning iOS into Android, but rather by adopting the highly
09:31:55 23 secure macOS model, a model that Apple itself designed,
09:31:59 24 whose safety Apple has repeatedly touted, and which shares the
09:32:05 25 same core operating system with iOS.

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09:32:08 1 The evidence through Dr. Mickens and others will show that
09:32:11 2 the basic security tools that Apple has designed for macOS
09:32:15 3 can easily be implemented to ensure iOS security in a more
09:32:20 4 open distribution model. And to the extent there are
09:32:23 5 differences between the security profile of iPhones and
09:32:26 6 Macs, for instance, the frequency with which a mobile device
09:32:30 7 with sensitive information can be stolen or lost, these are
09:32:34 8 addressed through security mechanisms such as face or Touch ID
09:32:39 9 that have nothing to do with how the apps get onto the iPhone.

09:32:45 10 Now, by bringing this lawsuit as a series of antitrust
09:32:48 11 claims, Epic bears the burden of proving the relevant product
09:32:53 12 and geographic markets, and we embrace that burden. The facts
09:32:57 13 fully support an iOS app distribution market and a totally
09:33:02 14 separate iOS In-App Payment Solutions market.

09:33:06 15 Dr. Evans will testify that evidence adduced at trial and
09:33:10 16 recognized economic theory supported by actual quantitative
09:33:15 17 analysis supports a classic foremarket of a long-lasting
09:33:20 18 product, an operating system, from which the aftermarket of
09:33:24 19 iOS app distribution is derived.

09:33:27 20 Apple criticizes Dr. Evans' for defining a foremarket that
09:33:31 21 is an operating system and not a device. But developers write
09:33:36 22 apps for an operating system, not a device.

09:33:38 23 And then from the consumer's side, Apple's own words
09:33:42 24 demonstrate why the evidentiary record supports us and not
09:33:46 25 them. Its ecosystem is defined by complementary OSs: iOS,

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macOS, tvOS, iPadOS. Consumers choose an ecosystem, and that ecosystem is iOS. Without an OS, the iPhone is metal and glass and does nothing at all.

The evidence will show that the foremarket provides the installed base for the aftermarket: iOS app distribution. Users incur real costs, sunk costs in buying into the iOS ecosystem. iPhones are not cheap. And once users incur these costs, they incur even more costs if they switch to Android.

The evidence from Apple's own witnesses, such as Mr. Cue and Mr. Fischer, will show that iOS users are not told, and Apple does nothing to market, how much they will spend on apps over the life cycle of their device. Consumers are locked into an ecosystem without ever knowing that cost. And Apple even prohibits developers from telling users how much Apple charges for distribution in IAP.

The evidence will show that in addition to extensive qualitative evidence, only Epic did the quantitative work to establish the parameters of well-defined product markets; Apple did not.

Epic's expert, Dr. Evans, performed four SSNIP tests. First, a SSNIP in the foremarket based on the operating system cost, applying a 10 percent assumed price increase to the cost of the phone. He found that this increase would not result in appreciable user switching.

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09:35:35 1 Why did Dr. Evans apply that price increase to the cost of
09:35:40 2 the phone? Very simply because it is the vehicle through
09:35:43 3 which you acquire the operating system. That is how you
09:35:47 4 measure user response.

09:35:48 5 Second, Dr. Evans did a SSNIP test for the distribution
09:35:53 6 aftermarket, based on the results of a survey performed by
09:35:58 7 Professor Peter Rossi. Professor Rossi surveyed how consumers
09:36:02 8 would react to a 5 percent increase in the price of in-app
09:36:05 9 purchases or in-app subscriptions bought within iOS apps.
09:36:11 10 The survey shows in-elastic demand and no appreciable
09:36:16 11 switching.

09:36:17 12 Here is a demonstrative from Professor Rossi showing that
09:36:20 13 the share of switchers was only 1.3 percent.

09:36:26 14 Using the results of that survey, Dr. Evans performed a
09:36:29 15 SSNIP test that confirmed that Apple could raise prices on
09:36:34 16 iOS without suffering a significant loss of consumers to
09:36:38 17 make that price increase unprofitable. This means that iOS
09:36:42 18 app distribution constitutes a relevant market.

09:36:46 19 Third, Dr. Evans used data from actual *Fortnite* play,
09:36:50 20 looking at how much switching actually happened when Apple
09:36:55 21 pulled *Fortnite* from the App Store and concluded that a
09:36:58 22 developer like Epic could not leave the iOS platform, even
09:37:03 23 in the face of a price increase without suffering a loss of
09:37:07 24 profits.

09:37:08 25 Fourth, Dr. Evans performed a SSNIP test concurrently on

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09:37:13 1 both sides of the two-sided platform, consumers and
09:37:15 2 developers, and reached the same conclusion. Neither group
09:37:18 3 would leave the platform in appreciable numbers, even taking
09:37:23 4 into account indirect network effects.

09:37:27 5 Apple did not perform a single SSNIP test. The surveys
09:37:32 6 Mr. Hanssens performed for Apple merely asked what devices
09:37:36 7 consumers have used or had access to in the last 12 months.
09:37:40 8 They do not assess whether consumers are able to switch to
09:37:43 9 other devices, for what purposes they are able to switch to
09:37:46 10 other devices, whether consumers are willing to switch to
09:37:51 11 other devices, nor the circumstances under which they would
09:37:54 12 switch.

09:37:54 13 In other words, the question of whether a price increase
09:37:59 14 on iOS would result in switching was not a question he
09:38:04 15 addressed in any way.

09:38:06 16 Under the antitrust laws, that is the critical question
09:38:11 17 when defining a market. The evidence will show that given the
09:38:13 18 sunk cost and limited switching in the smartphones OS
09:38:18 19 foremarket, consumers' lack of information, and the bait and
09:38:22 20 switch that Apple used to lure in developers, this is, in
09:38:27 21 fact, the unusual case in which there is a proper, single
09:38:31 22 brand aftermarket.

09:38:33 23 Let's look at a slide that shows a demonstrative example
09:38:37 24 of the types of apps distributed by -- I am sorry, Your Honor,
09:38:44 25 one second -- the evidence will disprove Apple's arguments to

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the contrary. Apple's argument that there is a digital gain transaction market is unsupported by the evidence.

First, that market is based entirely on the fact that the plaintiff here happens to be Epic, and it ignores that Apple's practices are the same with regard to all types of apps. And the evidence from third parties that will be adduced at this trial will show that all apps suffer from the same anticompetitive practices resulting in anticompetitive effects.

Second, it ignores that Epic does more than just develop, publish, or distribute games. Epic's witnesses will testify that Epic is a developer and publisher of game and nongame apps. The developer and publisher of a world-renowned set of software tools used to make game and nongame apps, and the developer and owner of an App Store that distributes game and nongame apps.

Let's look at a slide that shows a demonstrative example of the types of apps distributed by the Epic Games Store, including a store within a store. That is the digital store front. The music app Spotify, a radio app, a 3D modeling app, and a web browser, all available today on the Epic Games Store.

The evidence will show that Epic's business is varied. It is a developer of games and nongame apps. It makes software tools for the development of commercialized game and nongame

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09:40:30 1 apps, and it distributes both game and nongame apps.

09:40:32 2 The evidence will show that *Fortnite* itself, something
09:40:36 3 that Apple has repeatedly characterized as a game, and merely
09:40:41 4 a game, is far more than that. While it has competitive game
09:40:45 5 play in *Battle Royale*, it also has a portion of the app that
09:40:51 6 is solely for social gathering called *Party Royale*, which has
09:40:55 7 no competitive game play. And a portion that is solely for
09:40:58 8 user creation called *Creative Mode*, which has no competitive
09:41:02 9 game play.

09:41:03 10 *Fortnite* hosts concerts and it hosts films, among other
09:41:08 11 things.

09:41:09 12 In addition, Epic has also developed an alternative
09:41:13 13 payment processing solution to Apple's IAP, Epic Direct Pay.
09:41:21 14 All facets of Epic's business are here challenging Apple's
09:41:24 15 practices, but Apple's experts have focused on only one
09:41:27 16 limited to games.

09:41:28 17 Epic also develops the *Unreal Engine* and companion iOS
09:41:33 18 apps for developers who use it. Another point fatal to
09:41:37 19 Apple's digital game transaction market definition is that
09:41:40 20 Epic's claims encompass its interest in nongame apps built
09:41:47 21 using the *Unreal Engine*.

09:41:48 22 Epic has agreements with many developers of nongame apps
09:41:52 23 built on Epic's *Unreal Engine*, and some are distributed on
09:41:57 24 iOS and they are still subject to the anticompetitive
09:42:00 25 practices at issue here. Apple ignores these apps all

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09:42:05 1 together.

09:42:05 2 In sum, the evidence will show that when Apple focuses on
09:42:09 3 a digital game transaction market, it has failed to capture
09:42:13 4 the array of products made by the plaintiff in this case and
09:42:16 5 in which it has an interest.

09:42:19 6 Third, a game transaction market suggests that a
09:42:23 7 transaction on one platform would be substitutable for a
09:42:27 8 transaction on another platform. For Apple to be correct,
09:42:33 9 according to longstanding principles of antitrust economics,
09:42:36 10 some appreciable number of users of one platform would need to
09:42:40 11 be shown to switch to another based on price differentials
09:42:47 12 between the platforms. In other words, if there was an
09:42:50 13 increase in in-app purchases on iOS, the evidence would need
09:42:56 14 to show that an appreciable number of users would undertake
09:42:58 15 their desired transactions on alternative platforms, such as
09:43:02 16 Android or to console, or a console.

09:43:05 17 But there is no evidence to support this. Apple did no
09:43:10 18 study. Apple's top executives had, in fact, testified that
09:43:13 19 they were unaware of anyone ever switching because of the
09:43:18 20 increase in an app price.

09:43:20 21 First, we will hear from Mr. Cue.

09:43:22 22 (Videotape was played.)

09:43:22 23 Question: Are you aware of anyone who has ever
09:43:27 24 switched from an iPhone to an Android because they
09:43:33 25 perceived there to be some difference in the pricing

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09:43:36 1 of apps across the two platforms?

09:43:38 2 Answer: I don't recall ever hearing that.

09:43:45 3 Question: Is that something Apple has studied to
09:43:50 4 your knowledge?

09:43:50 5 Answer: No, I don't recall ever seeing that.

09:43:54 6 **MS. FORREST:** And now let's hear from Mr. Fischer,
09:43:55 7 again, the head of Apple's App Store.

09:44:00 8 (Videotape was played.)

09:44:00 9 Question: Are you aware of any instance where the
09:44:02 10 increased cost of an in-app purchase has resulted in
09:44:06 11 a user leaving the iPhone iOS world and going
09:44:12 12 instead to Android -- switching?

09:44:15 13 Answer: No, I have not personally heard of an
09:44:19 14 instance like that.

09:44:19 15 Question: Are you aware of any study that Apple has
09:44:22 16 done as to whether or not an increase in price of an
09:44:26 17 app on iOS could cause a user or has caused a user
09:44:33 18 to switch to Android?

09:44:34 19 Answer: I'm not aware of a -- of a study that has --
09:44:41 20 has looked at that.

09:44:45 21 **MS. FORREST:** In order to create confusion as to
09:44:47 22 substitutability, Apple points to evidence that is totally
09:44:50 23 unsupportive of the necessary switching behavior. Apple
09:44:54 24 points to *Fortnite's* consumer friendly cross-platform
09:44:58 25 functionalities called cross-progression and cross-wallet.

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09:45:02 1 Cross-progression allows players to access *Fortnite* with
09:45:06 2 their account across platforms, and recognizes that some
09:45:09 3 request users engage in incremental, but not substitutable,
09:45:12 4 game play. The evidence that we will adduce at trial supports
09:45:19 5 this.

09:45:19 6 Cross-wallet allows these users to access digital currency
09:45:23 7 in their accounts across platforms. In other words, a user
09:45:26 8 may have a console and a mobile device and use each of them at
09:45:30 9 distinct times. At the dentist the mobile device may be used;
09:45:34 10 at home, the console.

09:45:36 11 The evidence will also show that Apple's theory of
09:45:39 12 substitutable game transactions defies common sense. First,
09:45:44 13 it simply does not work when a user does not own two different
09:45:48 14 devices. If the consumer does not own an Android device or
09:45:52 15 console, the Apple expert posits an even less likely scenario
09:45:58 16 where he or she would seek out a friend who would let them
09:46:01 17 borrow their alternative device, engage in a transaction, and
09:46:04 18 then return to their own device.

09:46:07 19 Now, even when a user does own more than one device, the
09:46:11 20 evidence will show that a consumer playing a game on his or
09:46:14 21 her phone while waiting at the doctor's office or while
09:46:18 22 commuting to work is not going to, and practically cannot
09:46:22 23 decide to make an in-app purchase, or on a Xbox or a PC
09:46:28 24 sitting miles away at someone else's home.

09:46:32 25 This theoretical switching between devices a user may not

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09:46:36 1 even own is without factual support. As a technical matter,
09:46:39 2 the record will be full of another sort of evidence, evidence
09:46:43 3 that there are significant performance and functionality
09:46:46 4 difference between the very platforms that Apple claims users
09:46:50 5 substitute between.

09:46:51 6 The evidence will show that the apps in the App Store,
09:46:54 7 called native apps, have far superior functionality and
09:47:00 8 performance to web apps and streaming apps. Apple itself
09:47:03 9 ensures some of these differences by preventing web apps that
09:47:10 10 are used on iOS from accessing all of the latest web
09:47:14 11 technology that could result in functionality closer to native
09:47:18 12 apps. Web apps cannot call on certain very important APIs,
09:47:24 13 such as AR kit or push notifications, for instance, because of
09:47:30 14 Apple policy decisions.

09:47:31 15 And there is latency that Apple's own witnesses recognize
09:47:35 16 cause differences in performance between native apps on the
09:47:38 17 one hand and web apps and streaming apps on the other. In
09:47:43 18 this next slide Apple's Eddy Cue himself states that latency
09:47:47 19 can significantly impact the experience of the game.

09:47:51 20 The evidence will also show just how pretextual this
09:47:55 21 claimed substitutability is. Apple's witnesses concede that
09:47:59 22 there are voluminous differences between apps, web apps, and
09:48:03 23 streamed apps. Including that they are faster, they use less
09:48:07 24 memory, and they can provide overall a better iPhone
09:48:12 25 experience for users.

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09:48:15 1 Mr. Forstall testified precisely to the difference nature
09:48:20 2 apps, web apps, and streamed apps.

09:48:21 3 (Videotape was played.)

09:48:21 4 Question: And you believe that native apps are going
09:48:24 5 to, as you say here, provide a better experience for
09:48:29 6 iPhone users; correct?

09:48:30 7 Answer: Correct.

09:48:32 8 Question: And looking back 15 years later, do you
09:48:38 9 have any doubt that you were right at the time?

09:48:43 10 Answer: No.

09:48:45 11 Question: Why did you think that native apps would
09:48:50 12 provide a better experience?

09:48:51 13 Answer: I mean, I can go on and on and on for the
09:48:53 14 benefits of a native application versus a web
09:48:57 15 application, and they are voluminous. They are
09:49:01 16 faster. They use less memory. They can take
09:49:05 17 advantage of the native graphics libraries in a way
09:49:11 18 that is either not available or have to be shoehorned
09:49:17 19 in for a web app or a different kind of application.
09:49:21 20 So you can go through, and we can go through for
09:49:23 21 hours, the advantages.

09:49:27 22 **MS. FORREST:** Now, turning to consoles. There are so
09:49:30 23 many reasons that they are not substitutable, starting with
09:49:32 24 size, portability, functionality, quality, and capability of
09:49:36 25 graphics and additional peripherals. You are going to see

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those devices here in the courtroom later today, and you will see that they don't, in fact, fit in your pocket.

They can't work without a WiFi connection. The Xbox and the PlayStation have to be plugged into an electrical outlet at all times for game play. And none is a device that people carry with them wherever they go. None of these devices are substitutable for smartphones.

And finally, why is Android not substitutable? Because Apple itself has positioned it outside of the walled garden. iOS apps do not run on Android. Android apps are not allowed in the App Store. And the evidence will show that consumers make a choice of ecosystems at the OS level. And once having chosen, persistence within that ecosystem is strong.

iOS app distribution is the rare instance of a single brand product market, but it is made by the largest company in the world, has a billion users and millions of developers. As Apple's own expert, Professor Rubinfeld, has asserted, iOS has played a significant role in the world digital economy. The evidence will show that iOS is far bigger and far more entrenched in every factual way that matters than the Kodak copier at issue in the leading single brand market case ever was.

The evidence will also show that Apple's claims that in the absence of IAP it will not be able to get paid are

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incorrect. In terms of iOS In-App Payment Solutions, it is worth pausing on what purchases this aspect of the case is about and is not about.

This case is about purchases within the app, not purchasing transactions to acquire the app. A quick example of this IAP distinction is that of a car dealership. This case is not contesting that the dealer, i.e., the App Store, can take the commission for the sale of a car in a competitive market. Our claim is that every time thereafter the owner buys gas for the car at a third-party gas station, i.e., digital content, the original car dealer does not get to charge an extra 30 percent on that third-party gas sale.

In this slide we see an example of this with this demonstrative, that Apple takes a cut of every stop at a gas station after the car has been purchased, with no payment alternatives. And in this next slide, we see that what we are seeking is simply the possibility of alternative payment options at the gas pump. Apple is welcome to keep IAP as one of the options.

Apple next says, well, most apps, maybe even 80 percent, are free. So if it doesn't get a commission at the car dealership and doesn't get paid at the gas pump, it will never get paid for its investment in iOS and related tools. And that is not what the evidence will show and not how other OS makers are compensated.

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09:52:45 1 We will circle back to Apple's plan and how it executed on
09:52:47 2 the plan. Steve Jobs told developers, our purpose in the App
09:52:52 3 Store is to add value to the iPhone. Free apps do that just
09:52:56 4 as well as paid apps sometimes. We love free apps.

09:53:01 5 Apple benefits greatly from a robust inventory of free
09:53:05 6 apps. Free apps result in a more attractive App Store that
09:53:09 7 sells more devices. This is precisely what Steve Jobs said.

09:53:12 8 And in 2016 Apple began more active sales of
09:53:17 9 auctioned-based search. It has made very significant sums of
09:53:20 10 money on such sales and a high rate of return.

09:53:23 11 Of course, Apple also gets paid from the developer fees
09:53:27 12 that it collects from millions of developers. The evidence
09:53:30 13 will show that there is no dearth of ways for Apple to get
09:53:35 14 paid; it has figured them out already.

09:53:37 15 Before I conclude, let me address one final argument that
09:53:40 16 Apple makes. Throughout its findings of fact and in its
09:53:45 17 expert reports of Professor Rubinfeld and Mr. Malackowski,
09:53:48 18 Apple argues that all of its conduct sits firmly behind the
09:53:51 19 protective barrier of IP rights.

09:53:55 20 There are legal arguments here that I will not get into,
09:53:57 21 except to say that the evidence will show that IP rights do
09:54:02 22 not override competition law, as Apple's own primary witness
09:54:07 23 on this topic, Professor Rubinfeld, has already acknowledged
09:54:12 24 in this case.

09:54:12 25 The evidence also refutes Apple's arguments. The evidence

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09:54:16 1 will show that this argument is pretextual. There is no
09:54:20 2 evidence that Apple was considering IP rights when it was
09:54:24 3 drafting the terms and conditions it would impose on
09:54:26 4 developers. It was concerned with the policy issues of how to
09:54:30 5 build the walled garden.

09:54:31 6 Apple's overreach with IP could not be clearer in this
09:54:36 7 statement by Phil Schiller at a time when the App Store was
09:54:40 8 already up and running, that Apple should use its license
09:54:43 9 agreement as a way of protecting its ecosystem.

09:54:46 10 Your Honor, Epic wants to reach customers locked inside
09:54:51 11 Apple's walled garden. In the absence of Apple's
09:54:54 12 restrictions, Epic and all developers will not only be able to
09:54:58 13 reach those customers directly, but Epic will be able to
09:55:02 14 provide them with more innovation, lower prices, and better
09:55:06 15 customer service.

09:55:07 16 We submit that once the evidence is in, it will show
09:55:11 17 unambiguously that Apple is a monopolist, has unlawfully
09:55:17 18 maintained its monopoly, and that Epic made its burden on all
09:55:24 19 claims. Thank you.

09:55:26 20 **THE COURT:** Ms. Dunn.

09:55:32 21 **MS. DUNN:** Thank you, Your Honor.

09:56:22 22 Our technologist needs to switch the AV. So if we may do
09:56:27 23 that or take a break to do that?

09:56:30 24 **THE COURT:** I think Ms. Stone is doing that. You can
09:56:33 25 hear okay?

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09:56:37 1 **THE CLERK:** I just thought it might be her
09:56:38 2 convenience to do it from there.

09:56:41 3 **THE COURT:** It is actually better for me if you stay
09:56:43 4 right there.

09:56:45 5 **MS. DUNN:** Then I shall stay here.

09:56:46 6 **THE COURT:** We have this barrier here, and the metal
09:56:48 7 impacts my view.

09:56:51 8 **MS. DUNN:** Let me check the sound.

09:56:53 9 **THE COURT:** I can hear you.

09:57:14 10 **MS. DUNN:** Thank you, Your Honor.

09:57:14 11 **OPENING STATEMENT**

09:57:14 12 **MS. DUNN:** And may it please the Court. Karen Dunn
09:57:17 13 for Apple.

09:57:19 14 Ever since the launch of the first iPhone in 2007,
09:57:23 15 consumers have depended on Apple to provide a safe, secure,
09:57:28 16 reliable, and quality smartphone. And because of the trust
09:57:35 17 that Apple has been able to build with consumers, it has also
09:57:39 18 been able to build business opportunities for millions of
09:57:43 19 developers. And because of the connections between consumers
09:57:47 20 and developers in Apple's App Store, millions of businesses
09:57:53 21 have been launched that would not have otherwise existed.
09:57:57 22 Millions of jobs have been created worldwide, and nearly a
09:58:02 23 decade of economic growth has been unleashed.

09:58:07 24 This case, as has just been made quite clear, is a
09:58:11 25 fundamental assault on Apple's secure and integrated ecosystem

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09:58:18 1 which has been what has made that tremendous growth possible.

09:58:24 2 Epic, a 28 billion-dollar company, has decided that it
09:58:28 3 doesn't want to pay for Apple's innovations anymore. So Epic
09:58:33 4 is here demanding that this Court force Apple to let into its
09:58:41 5 App Store untested and untrusted apps in app stores, which is
09:58:48 6 something that Apple has never done. Apple's unwavering
09:58:50 7 commitment to safety, security, reliability, and quality does
09:58:56 8 not allow that, and the antitrust laws do not require it.

09:59:03 9 When the iPhone first launched it was named the 2007
09:59:07 10 invention of the year. And as Tim Cook and Phil Schiller will
09:59:13 11 tell you, not even they could have imagined then what this
09:59:17 12 little device would come to mean to so many consumers and
09:59:21 13 developers.

09:59:21 14 Soon after launch developers came to Apple. They already
09:59:25 15 had access to consumers through the web browser, but they came
09:59:30 16 to Apple to ask if they could put native third-party apps on
09:59:35 17 the iPhone. And as you will hear, at the time there was a
09:59:38 18 great amount of internal debate about Apple -- at Apple about
09:59:42 19 whether to do this, because putting native third-party apps on
09:59:46 20 the iPhone could compromise the phone itself.

09:59:48 21 This is how Steve Jobs put it at the time. He said, we're
09:59:52 22 trying to do two diametrically opposed things at once:
09:59:56 23 Providing an advanced and open platform to developers while at
10:00:09 24 the same time protect iPhone users from viruses, malware,
10:00:13 25 privacy attacks, et cetera. This is no easy task.

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1 And Mr. Jobs also told people to be patient, and that
2 Apple would work on figuring out a way to get everybody what
3 they wanted. And Apple did find a way to get everybody what
4 they wanted: A highly curated, family friendly, secure and
5 reliable App Store.

6 The App Store opened its doors in 2008, and since then
7 millions of developers, from small one-person shops, to large
8 well-known companies, if they had a great idea and a
9 high-quality app, have been able to seamlessly reach consumers
10 around the world. So Apple did not create a secure and
11 integrated ecosystem to keep people out; it created a secure
12 and integrated ecosystem so it could invite developers in,
13 without sacrificing the privacy, reliability, security, and
14 quality that consumers wanted.

15 And every day since then Apple's businesspeople and
16 engineers, some of whom the Court will hear from at this
17 trial, have been charged with striking that seemingly
18 impossible balance between two diametrically opposed things at
19 once.

20 Now in this case, as you heard, Epic's requested relief
21 would undo everything that those engineers and businesspeople
22 have built and that consumers have trusted and loved. And
23 that is why we are bringing to this Court the top executives
24 at Apple, including CEO Tim Cook; top executives Phil Schiller
25 and Craig Federighi, to explain to Your Honor why Apple made

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these fundamental design decisions and why they are necessary to protect security, privacy, reliability, and quality that customers have come to depend on from Apple.

Epic is demanding that this Court undue Apple's fundamental design decisions. And after counsel's opening, there can be no question about that. Epic demands that this Court force Apple to allow in any and all third party app stores so they can distribute unreviewed and untested apps on all iOS devices.

And Epic demands that this Court force Apple to allow sideloading, which would allow third parties to put unreviewed and untested apps directly on the device.

Epic demands that this Court force Apple to do all of this which would require using its IP and making its products technically interoperable without third parties having to pay for it.

The law just does not permit this as we will discuss.

From the very beginning Apple gave developers access to iOS in the App Store, and that access was tremendous. Any developer who signed the developer program license agreement, the DPLA, had access to Apple's SDKs, software development kits, containing thousands of Apple's APIs, application programming interfaces.

And those are what gives developers the tools that they need to be successful.

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10:03:43 1 The first developer kit had 10,000 APIs. Today there are
10:03:48 2 150,000 for the App Store alone. And that is a 15-fold
10:03:55 3 increase in almost as many years. All of this has been made
10:04:01 4 possible by Apple's IP. Every app in the App Store has been
10:04:05 5 developed using Apple's IP. And Epic knows this because the
10:04:13 6 restrictions that it challenges, the provisions it challenges,
10:04:16 7 specifically relate to Apple's software and the use of Apple's
10:04:20 8 software.

10:04:21 9 So Apple licenses its IP to developers in exchange for
10:04:26 10 their commitment to submit each app for review and approval.
10:04:32 11 And that is the way that Apple is able to keep its commitment
10:04:36 12 to consumers -- safety, reliable -- reliability and quality --
10:04:40 13 and simultaneously provide developers with enormous business
10:04:47 14 opportunities.

10:04:48 15 Epic, for example, has been using Apple's IP for more than
10:04:52 16 a decade, since *Infinity Blade* first launched on the App
10:04:58 17 Store. *Fortnite*, we will hear a lot about *Fortnite*, that is
10:05:01 18 Epic's signature product, as you know. It has only been
10:05:04 19 around for a few years. And even *Fortnite* has been created
10:05:07 20 and updated are using 16 of Apple's SDKs, which have included
10:05:12 21 thousands of Apple's APIs.

10:05:15 22 Now, I heard counsel just dismiss RIP, but actually Epic
10:05:23 23 has been very praiseworthy of Apple's IP and everything that
10:05:28 24 is has done for Epic. This is what Epic had to say about
10:05:33 25 metal: Just one of Apple's API, a fast, agile, feature-rich

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10:05:38 1 API-like metal is exactly what we need to bring a game
10:05:43 2 designed for modern consoles and desktops to the
10:05:46 3 battery-powered iPhone and iPad. As a developer, it blows
10:05:49 4 away open GL in every way.

10:05:56 5 As Tim Cook has said, the App Store has been nothing short
10:06:01 6 of an economic miracle. And since the App Store first opened
10:06:05 7 its doors in 2008, there have been more than 108 billion app
10:06:11 8 downloads. This is the kind of output antitrust laws dream
10:06:17 9 about. Quality products delivered to consumers by the
10:06:21 10 billions. And no one is going to dispute what this chart
10:06:24 11 shows, but Epic is going to ignore it, as you just heard,
10:06:28 12 because of how devastating this degree of output is in an
10:06:32 13 antitrust case.

10:06:36 14 Now, this chart is also devastating to Epic's case. When
10:06:42 15 it comes to privacy and security, Apple dramatically outpaces
10:06:48 16 its competitors. You can see their Android, which allows
10:06:52 17 sideloading, and you can see the dramatic difference. Epic
10:06:57 18 just said that Apple failed to deliver on this. This is
10:07:01 19 delivery.

10:07:01 20 You will even hear Tim Sweeney, Epic's CEO, acknowledge
10:07:07 21 that privacy and security are, quote, competitive
10:07:12 22 differentiators for Apple. They give consumers a choice
10:07:16 23 between iPhone devices and their competitors.

10:07:20 24 And that choice is made possible by the very same App
10:07:25 25 Store wars that Epic is demanding this Court get rid of. And

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10:07:29 1 after what we just heard, one thing is very clear: Epic is
10:07:34 2 asking for government intervention to take away a choice that
10:07:37 3 consumers currently have.

10:07:43 4 Epic, as you heard, also asks the Court to get rid of what
10:07:46 5 is called IAP functionality, and that is a feature that Apple
10:07:52 6 added to the App Store in 2009 in response to requests from
10:07:57 7 developers. Some history here.

10:07:59 8 When the App Store first opened developers had only a
10:08:03 9 choice between paid apps and free apps. And so what game
10:08:09 10 developers would do is they would offer two versions of the
10:08:12 11 game: One, a paid version, which was a premium version that
10:08:15 12 consumers could pay for when it was downloaded; and one for
10:08:19 13 free, which was kind of a not-as-good version of the paid
10:08:23 14 game.

10:08:23 15 So developers came to Apple and asked for a new way to
10:08:29 16 monetize their apps, where developers could offer an app for
10:08:34 17 free for consumers to download, and then sell content to the
10:08:37 18 consumers within the app.

10:08:40 19 Apple listened to its developers, and the business model
10:08:44 20 of "freemium" was born. This was made possible by a complex
10:08:51 21 functionality to deliver digital content that Apple called
10:08:55 22 In-App Purchase, or IAP.

10:09:00 23 Now, game developers in particular benefited from IAP
10:09:07 24 functionality. The slide you see on the screen right now is a
10:09:10 25 picture of the *Fortnite* shop. You can buy outfits to wear in

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1 the metaverse, a glider for your rideable shark, or a batcycle,
2 or a dance. It appears here you can even buy true love, which
3 is priceless.

4 These are called micro transactions. And rather than one
5 paid transaction with the developer that happens at the first
6 download, these can happen all the time. This is great for
7 developers. So like the App Store in its design, IAP is what
8 the antitrust laws would consider a genuine product
9 improvement.

10 And it certainly was a product improvement for Epic, which
11 has made more than \$750 million on the iOS platform alone.

12 So Apple's App Store has created tremendous output,
13 increased choice, benefits for consumers and for developers,
14 all of which the antitrust laws would consider a wild success.

15 So what are we doing here in an antitrust case? Well, the
16 answer is this: As counsel mentioned, Project Liberty, which
17 is Epic's self-proclaimed war against mobile platform fees.

18 What you see on the screen, Your Honor, is a slide for the
19 Epic board from July of 2020. In the second half of 2019
20 prior to the pandemic, Epic had seen a meaningful decline in
21 *Fortnite*. Internally, Epic executives started to discuss a
22 business model shift where Epic would become the middleman,
23 paying third-party developers to develop content.

24 But to pay the third-party developers, Epic would need to
25 find a way to cut its cost. So after 10 years of paying the

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1 same commission and abiding by the same rules that apply to
2 all developers and have been in place since the beginning, the
3 evidence will show that Epic did not want to do that anymore.
4 And so rather investing in innovation, Epic invested in
5 lawyers, PR and policy consultants, all in an effort to get
6 the benefits that Apple provides for free.

7 And Epic knew that it was, quote, not sympathetic. And
8 those are Epic's words, not ours. And as Epic's head of
9 marketing wrote in May of 2020, he sent an email to himself,
10 he said, they needed to create the narrative that Epic was
11 benevolent, speaking for other developers.

12 But at the same time, Epic was writing to Apple in June of
13 2020, demanding that Apple provide a special side deal, side
14 letter or alter its contract for Epic. So Epic would not have
15 sued Apple or done any of this if Apple had just agreed to a
16 side deal that would only apply to Epic.

17 And as this Court is well familiar, Apple did not agree.
18 Apple refused to compromise the equal application of its
19 guidelines. And so Epic went a step further, willingly and
20 flagrantly breaching its commitments with Apple. And Epic's
21 conduct in the summer of 2020 will defeat all of the
22 affirmative defenses that Epic has to this breach, the breach
23 to which Epic has already stipulated.

24 As this Court well knows, on August 3rd of 2020, Epic
25 submitted to Apple a version of *Fortnite* with a secret and

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undisclosed hot fix with Epic's own payment system. And 10 days later, on August 13th, after emailing the Apple executives at 2:00 in the morning with their intention to breach, Epic activated its hot fix resulting in *Fortnite's* removal from the App Store.

Now, even though Epic had breached, Apple told Epic that *Fortnite* was welcome back into the App Store, as long as Epic would comply with the guidelines that apply equally to all developers. And that offer still stands today.

Now, here is something interesting: Which is that on August 5th, Epic CEO, Tim Sweeney, is writing an email to Phil Spencer, vice president of gaming at Microsoft. And Mr. Sweeney writes, Epic has certain plans for August that will provide an extraordinary opportunity to highlight the value proposition of consoles and PCs in contrast to mobile platforms and to onboard new console users.

So by August 5th, the date of this email, the hot fix is already in place. And so while Epic is deceiving Apple, it is giving Microsoft a head's up that something is coming.

He is reassuring Microsoft that Epic will be creating opportunities for consoles, quote, in contrast to mobile platforms which will help, quote, onboard new console users.

So Mr. Sweeney recognizes in this email that consoles and PCs are competitors to mobile platforms, which is the exact opposite position that Epic is taking in this litigation.

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Here is Tim Sweeney speaking in 2012, two years after Epic now says Apple became an illegal monopolist. Here, too, Mr. Sweeney is saying the exact opposite of what Epic is trying to spin in this lawsuit.

He says, we have a lot of platforms coming together. There are tablet platforms, smartphone platforms, computers, you know, PC and Macintosh. And then there are consoles: Xbox, PlayStation, Wii. This is too many platforms. Over time these platforms will be winnowed down into a much smaller set of competing platforms, according to who picks the right directions and executes successfully on them.

So Mr. Sweeney recognizes all of the competitors: Tablets, smartphones, PCs and consoles. And the fact be competition. Winners and losers who will be determined not by monopoly power, but by who picks the right direction and successfully executes on them.

And so this is truly remarkable. Epic in this litigation is arguing and insisting as we just heard, that this precise market in gaming transactions does not exist. And so we are all going to have to pay close attention to what is real and what has been manufactured by Epic to this litigation.

And speaking of things that are manufactured, Epic paid nearly the entire cost to create the so-called Coalition For App Fairness. The coalition says things like this: For most purchases made within its App Store, Apple takes 30 percent of

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10:17:03 1 the purchase price. No other transaction fee in any industry
10:17:07 2 comes close.

10:17:11 3 But that is not true either.

10:17:14 4 Given Epic's attacks, especially this morning, it may
10:17:18 5 surprise people to learn that Apple did not establish the
10:17:21 6 30 percent. It was Steam, another game platform, that set the
10:17:28 7 30 percent way back in 2003. And by the time that Apple
10:17:33 8 entered the market with the App Store in 2008, 30 percent was,
10:17:38 9 as Epic's internal documents will show, industry standard.

10:17:44 10 Epic just showed us a clip of Eddy Cue, but even in that
10:17:49 11 clip that Epic chose to show Eddy says that Apple was
10:17:55 12 following the market.

10:17:56 13 And just as those competitors who came before Apple
10:18:01 14 charged 30 percent, so did the ones who entered the market
10:18:04 15 after Apple. And this includes the Google Play Store, the
10:18:09 16 Samsung Galaxy store, Microsoft, HP, Amazon. This is the kind
10:18:15 17 of market entry that is the hallmark of competition.

10:18:21 18 Now, 30 percent was also substantially less than the
10:18:26 19 typical publisher royalty at the time. Developers used to pay
10:18:31 20 70 percent, not 30 percent, and that was for shrink-wrap boxes
10:18:36 21 that sat on actual shelves. And when Mr. Sweeney distributed
10:18:40 22 third-party games in the 1990's, he charged 60 percent, and
10:18:46 23 he's described in this litigation as a fair royalty.

10:18:53 24 So today in the App Store, 84 percent of apps are free.

10:18:57 25 It is true that we love free apps. And so for 84 percent of

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10:19:02 1 apps, developers pay zero to Apple. Many pay 15 percent due
10:19:10 2 to reduced commissions on subscriptions and for small
10:19:13 3 businesses, and the most a developer will pay is 30 percent.

10:19:19 4 So putting all the rhetoric aside, we are here in a bench
10:19:25 5 trial in an antitrust case. And in this antitrust case where
10:19:31 6 Epic bears the burden, as counsel said, it cannot prevail.
10:19:34 7 Not on the law and not on the facts.

10:19:37 8 Epic is wrong on its relevant market. Epic cannot show
10:19:43 9 that Apple's conduct was anticompetitive. Epic cannot show
10:19:48 10 that there are anticompetitive effects. Apple has a host of
10:19:54 11 procompetitive justifications for its conduct, and Epic cannot
10:19:58 12 prove a tie.

10:19:59 13 So in order to win this case, Epic has to run the table on
10:20:04 14 this. It has to be right on all of these, and we will show
10:20:07 15 that on the law and on the facts, Epic is not right on any of
10:20:11 16 them.

10:20:12 17 Now, every one of Epic's claims depends on its ability to
10:20:18 18 define a relevant market, the universe of reasonable
10:20:22 19 substitutes. And as counsel said, their economist, Dr. David
10:20:29 20 Evans, proposes a single brand aftermarket of iOS app
10:20:30 21 distribution containing all apps in the App Store. And as
10:20:36 22 counsel recognized, Epic bears the burden of proving that this
10:20:40 23 would be what the law has said is the extremely rare case of
10:20:45 24 finding a single brand market.

10:20:47 25 Now, the Court has already said in her PI order, that the

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proper market definition can only be determined by looking at commercial realities. So we are going to focus on those.

One of our expert economists, Dr. Francine Lafontaine, who served as the director of the FTC's bureau of economics, will offer opinions to the Court about proper market definition. And Dr. Lafontaine will explain why, based on commercial realities, Epic's proposed market is both too broad in terms of number of apps and too narrow in terms of number of platforms.

Okay. So to begin with, Epic's proposed market is too narrow because there are many, many, many platforms where consumers and developers engage in game transactions: PC, Mac, iPhone, Android, consoles including Xbox, PlayStation and the Nintendo Switch, which by the way does fit in your pocket. Even within these devices, there are sometimes multiple options.

New markets entrants are coming on the scene right now. Cloud-based streaming by Google Stadia, Amazon Luna, and Nvidia's GeForce Now. And those are offered both through the web and by native app. So Epic is really down on the web browser, but some of the world's most sophisticated companies are launching their newest and most exciting products through the web browser.

So what this market shows is options and options within options. And, again, this is what a competitive market looks

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10:22:33 1 like. And Epic's market ignores all of that and focuses only
10:22:39 2 on this: The iPhone and the App Store. That is Epic's
10:22:44 3 relevant market.

10:22:46 4 Now, to begin with, Epic's proposed single brand market is
10:22:52 5 also too narrow because consumers do something called
10:22:53 6 multi-homing. And that means they use more than one device to
10:22:58 7 play games. So there is a bunch of survey experts in this
10:23:03 8 case, and this is a result of a survey done by our expert,
10:23:04 9 Dr. Hanssens. Nick found that 95 percent of iOS users
10:23:09 10 regularly use or could have used devices other than their
10:23:13 11 iOS device like PC's max or gaming consoles.

10:23:17 12 Now, not only do consumers multi-home, developers also
10:23:24 13 multi-home. They are offering their games to consumers on
10:23:27 14 multiple platforms. *Fortnite*, just to take one example, is
10:23:33 15 offered on many different platforms, including Android, PC,
10:23:37 16 Microsoft, Xbox, Sony PlayStation, and the Nintendo switch.
10:23:42 17 And you can see that Apple is not such a big part of that. So
10:23:48 18 as illustrated by Epic itself, Apple is not imposing any
10:23:53 19 restrictions on game developers' ability to reach consumers
10:23:57 20 and sell their apps on as many or as few platforms as they
10:24:02 21 would like.

10:24:03 22 And our expert, Dr. Lorin Hitt, a professor at Wharton,
10:24:08 23 has analyzed competition and substitution in the game
10:24:13 24 transaction market, which is something that Dr. Evans, Epic's
10:24:17 25 expert, does not test at all.

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1 This is a chart from Dr. Hitt's report. On this chart
2 iOS is the red line. And this chart shows the majority of
3 *Fortnite* accounts are not on iOS. Many are on Android or
4 the Switch or Xbox or PlayStation or PC.

5 iOS is typically the third or even the fourth most
6 popular platform. Again, makes you kind of wonder what we are
7 doing here. It also appears that when *Fortnite* was removed
8 from the App Store the red line goes down. And all the other
9 lines go up, except for the purple line because that is the
10 Google Play Store and *Fortnite* was removed from there as well.

11 The Court will see that the same thing happened when
12 Nintendo launched the aptly named Switch in 2018; the number
13 of iOS users went down. So consistent with commercial
14 realities, Dr. Hitt is going to present both qualitative and
15 quantitative evidence that consumers switch among gaming
16 platforms.

17 And in real life, even if not in this courtroom today,
18 Epic has recognized that consumers do substitute across game
19 platforms. Here is what they told people when they got
20 *Fortnite* removed from the App Store. If you are left behind
21 on iOS after the Chapter 2, Season 4 launch, the party
22 continues on PlayStation 4, Xbox 1, Nintendo Switch, PC, Mac
23 GeForce Now, and through both the Epic games app, at
24 epicgames.com, and the Samsung Galaxy store.

25 So it would be fair to ask Epic how they can deny to this

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1 Court the robust competition in this market when this is the
2 kind of thing that they are saying to people publicly.

3 In addition to multi-homing, we are also going to be
4 talking about the commercial reality of cross-platform play.
5 Modern gaming, which this trial is going to show us, is really
6 a thing unto itself. And it allows people to play the same
7 game at the same time with other people on different
8 platforms.

9 So this slide is a picture of four people playing the game
10 Need for Speed. And it highlights how absurd Epic's approach
11 to relevant market is. One of these people is playing on the
12 Xbox. Another one is playing on the iPhone. One is playing
13 on the Nintendo Switch. And one is playing on the PC. So
14 even though these four people are all playing the same game at
15 the same time, three of these people are not in Epic's
16 relevant market.

17 That is not the commercial reality.

18 The Court is also going to hear evidence about something
19 that is also very important called cross-wallet play. So
20 cross-wallet play means that consumers can buy game currency
21 on one platform, and then spend it on another. So, for
22 example, I can buy V-Bucks, which is the currency used in
23 *Fortnite*, on any of these platforms and spend them on any of
24 the others. And so that means if I buy V-Bucks on Android, or
25 PC or Xbox, but I spend them while I am playing *Fortnite* on

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10:27:59 1 iOS, no commission goes to Apple.

10:28:03 2 I can even buy V-Bucks through the web browser on my
10:28:07 3 iPhone and spend them on purchases in the app. That is
10:28:13 4 available to me. So even though I bought the V-Bucks on my
10:28:17 5 iPhone, no commission goes to Apple.

10:28:23 6 And cross-wallet play creates an enormous and
10:28:28 7 unrecoverable problem for Epic's market definition. Here is
10:28:33 8 why: The parties agree that the App Store is a two-sided
10:28:36 9 transaction platform serving both consumers and developers.
10:28:41 10 The Supreme Court in the Amex case in 2018 said that such
10:28:48 11 transaction platforms are best understood as supplying one
10:28:51 12 product, transactions, which is jointly consumed.

10:28:56 13 So Dr. Evans focuses on app distribution, not
10:29:01 14 transactions. But where are the transactions happening? In
10:29:07 15 gaming, transactions, like the purchase of V-Bucks, can take
10:29:12 16 place someplace other than where the app is being distributed.
10:29:16 17 And so I may be playing an app distributed on iOS, but the
10:29:21 18 transaction occurred somewhere else, like on Android or Xbox
10:29:25 19 or my PC.

10:29:27 20 And that platform is where the Supreme Court says the one
10:29:32 21 product, the transaction, is being jointly consumed. And in
10:29:38 22 fact, Epic's internal data show that most people who play
10:29:43 23 *Fortnite* on iOS are not engaging in transactions on iOS.

10:29:47 24 So this is a very big issue for Epic, and we heard nothing
10:29:53 25 this morning that is going to get them around this issue, and

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1 we will hear nothing throughout this entire trial that will
2 get them around this issue.

3 So all of that goes to why Epic's relevant market is too
4 narrow. But Epic's relevant market is also too broad because
5 it includes all apps in the App Store. So the App Store is a
6 store, and like many stores it is full of products that are
7 not substitute for each other.

8 So the slide has just a few examples.

9 *Fortnite* is not a substitute for Waze and it is not a
10 substitute for the Starbucks app. Under the law, including
11 the law in the Ninth Circuit, for Epic to cluster all of these
12 non-substitutes together, it would have to show that products
13 in the store are subject to the same competitive conditions,
14 and Epic cannot show that.

15 As we've just discussed the gaming market is subject to
16 distinct competitive conditions that facilitate substitution.
17 Like multi-homing across many platforms, cross-platform play
18 and cross-wallet play. And so this is Epic's burden to show.
19 They have to show that clustering is appropriate under the
20 law.

21 And even though the Court raised the issue of clustering
22 in her PI order, Epic doesn't mention it at all in its
23 conclusion of law. We didn't hear one single word about this
24 this morning. And there is a reason for that, because they
25 don't win on it and it is dispositively defeating for their

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10:31:37 1 relevant market.

10:31:38 2 So just to take another real-world example of this:

10:31:42 3 Groceries also sell a lot of products, like bread, fruit,

10:31:46 4 toiletries. Sometimes they even sell wine. Now, imagine

10:31:51 5 there is a liquor store down the road and maybe also a

10:31:54 6 boutique wine store next door.

10:31:57 7 All day long customers are going in and out of these three

10:32:01 8 stores buying wine. Customers make choices. Why buy wine

10:32:06 9 from this store or that store. Epic is like the wine maker

10:32:09 10 who brings an antitrust case, but excludes the liquor store

10:32:13 11 and the wine store. That does not reflect the commercial

10:32:16 12 reality.

10:32:16 13 And it also does not matter if the liquor store also sells

10:32:23 14 tonic water and limes, because those other products are not

10:32:28 15 going to move the needle on substitution.

10:32:31 16 And so Epic's counsel made a big point, it is true that

10:32:34 17 within the last two weeks they have shoved some other apps

10:32:39 18 onto their platform, but those things are not moving the

10:32:43 19 needle on substitution, which is what Epic would have to show.

10:32:50 20 So based on what I have already said, Epic's relevant

10:32:59 21 market is wrong, and that defeats all of its claims.

10:33:03 22 But I do want to address a couple of things counsel said

10:33:05 23 in opening. Epic spent some time discussing switching between

10:33:08 24 the hardware of iPhone devices and Android devices.

10:33:15 25 Now, the first problem with this is that they are not

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10:33:16 1 talking about switching of app transactions. Epic ignores all
10:33:20 2 the other platforms where game transactions and any other app
10:33:24 3 transactions take place, the one product that is being jointly
10:33:28 4 consumed.

10:33:30 5 Second of all, even when it comes to switching between
10:33:33 6 iPhone and Android, Epic is wrong about that too, and that is
10:33:37 7 because they ignore the actual data. Apple's internal
10:33:41 8 documents show that in 2019 and 2020 there was meaningful
10:33:46 9 switching quarter over quarter when iPhone users purchased a
10:33:52 10 new phone, sometimes up to 26 percent. So the evidence will
10:33:55 11 show that not only is Epic wrong about its aftermarket, it is
10:33:59 12 wrong also about the foremarket.

10:34:03 13 And it is true that Dr. Evans pretends to bring some
10:34:08 14 science to this exercise by saying he has performed several
10:34:14 15 SSNIP tests. Well, we don't have enough time this morning to
10:34:17 16 go through all of the problems that we will show with
10:34:20 17 Dr. Evans' SSNIP test.

10:34:24 18 But to begin with, Dr. Evans performs no quantitative
10:34:26 19 analysis with any actual Apple consumer data showing any
10:34:30 20 actual substitution. It is their burden.

10:34:32 21 Instead, he conducts a SSNIP on operating systems, which
10:34:38 22 are not commercially available, so he has to make up the
10:34:41 23 prices that he uses for those, and uses prices for phones
10:34:44 24 which are part of a different market. And even though he has
10:34:48 25 written himself about the importance of analyzing indirect

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10:34:52 1 network effects in a two-sided market, he doesn't do that
10:34:55 2 either.

10:34:56 3 So it was very ironic to hear counsel's opening statement
10:35:01 4 because Epic has the burden of proof, and Epic itself in this
10:35:05 5 case has offered no empirical evidence of switching at price
10:35:11 6 increase. They fail by their own with standards.

10:35:14 7 **THE COURT:** Ms. Dunn, can you hold on? I really
10:35:18 8 am -- I apologize for interrupting you.

10:35:21 9 Apparently Line 3 is having an issue.

10:35:40 10 And I see we are at -- how much more do you have? Your
10:35:46 11 slides aren't -- I can't tell how many slides you have left.
10:35:51 12 The numbers aren't chronological.

10:35:54 13 **MS. DUNN:** So I am probably halfway through.

10:35:56 14 **THE COURT:** Why don't we go ahead, then, if you don't
10:35:58 15 mind and take a break.

10:36:00 16 **MS. DUNN:** Absolutely.

10:36:01 17 **THE COURT:** That way we can figure out what is going
10:36:02 18 on with Line 3. And we have been on the record -- I will give
10:36:10 19 my court reporter a break.

10:36:11 20 We will stand in recess for 20 minutes.

10:36:15 21 (Recess taken at 10:36 a.m.; resumed at 10:57 a.m.)

10:52:54 22 **THE COURT:** We are back on the record. The record
10:57:32 23 will reflect the parties are present.

10:57:35 24 Ms. Dunn, you may proceed.

10:57:37 25 **MS. DUNN:** Thank you, Your Honor.

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1 The chart that's currently on the screen shows us why
2 Epic, throughout this case, is going to have to twist itself
3 into a pretzel with disfavored theories and bad law to define
4 a relevant market. In the logical market in this case that
5 reflects commercial reality, the market for game transactions,
6 Apple cannot be argued to be a monopolist.

7 Now, Epic also cannot show that Apple's conduct is
8 anticompetitive. In the recent *Qualcomm* case decided by the
9 Ninth Circuit, before the Ninth Circuit even looked at
10 anticompetitive harm, it looked to see if there was
11 anticompetitive conduct in the first place, applying Supreme
12 Court and Ninth Circuit precedence on duty to deal. So as in
13 *Qualcomm*, this law forecloses Epic's case.

14 The Court is very familiar with the law in this area. And
15 that law is clear that businesses do not have a duty to deal
16 with competitors. And because they do not have a duty to deal
17 in the first place, they do not have a duty to deal on the
18 terms and conditions that those competitors might prefer.
19 That's *Trinko* and *linkLine* from the Supreme Court, *Qualcomm*,
20 *Arrow-Tech* and various others from the Ninth Circuit.

21 And the law in this area, which Epic's counsel declined to
22 discuss, is particularly strong in the area of intellectual
23 property. Businesses have no duty to make their products
24 interoperable or to license their IP. And amongst others,
25 this is the foremost pro case in the Ninth Circuit.

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1 That case says that the law regards technical
2 incompatibility, for example, an integrated ecosystem, as
3 procompetitive because it gives consumers a choice, like
4 between the iPhone and the Android devices.

5 In this case, Epic challenges Apple's technical design and
6 contract because they block, prohibit, and foreclose third
7 party app stores, apps, and payment systems. They are
8 challenging a refusal to deal. And this slide contains a list
9 of just some of the places in Epic's expert reports where they
10 outright say this. And as in the *Qualcomm* case, very recently
11 decided, this is a nonstarter under the law.

12 The relief that Epic seeks absolutely requires forced
13 interoperability in a compelled license. Epic has already
14 admitted in its interrogatory responses in this case that it
15 is virtually impossible to develop an app for iOS without
16 Apple's IP, its APIs.

17 In other words, third party apps, app stores, and payment
18 systems can only exist on iOS with Apple's IP. So Apple
19 would be forced to license its IP, even to untested and
20 untrust apps and app stores, and to make its products
21 interoperable with every app and app update.

22 And I suspect you will not hear the Epic witnesses deny
23 this because they know what IP is required, and they know what
24 it takes, including on the engineering front, to make sure
25 that the products are interoperable and that those products

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11:01:34 1 will work on the iOS platform. This is a case about
11:01:39 2 software.

11:01:40 3 Now, when we look at Epic's actual proposed injunction
11:01:49 4 language, it jumps right off the page at you. And so we
11:01:53 5 didn't list it out all on the side because there is too much
11:01:57 6 of it, but it is very clear. When you look at the language
11:01:58 7 that they are demanding in the form of an injunction, when it
11:02:01 8 comes to sideloaded apps, third party app stores, and third
11:02:10 9 party payment, they are seeking a requirement to deal, a
11:02:12 10 requirement to license, and forced interoperability.

11:02:15 11 We have one example on this slide where it's just
11:02:16 12 undeniable. Epic is asking the Court to prohibit Apple from
11:02:22 13 impeding third party app stores payment systems through
11:02:25 14 technical means and contractual means. That means we would
11:02:28 15 need to make our products technically interoperable, and we
11:02:32 16 would be forced to enter into contracts to license our IP.

11:02:37 17 The law just does not require that. And it does not
11:02:41 18 permit it. And it is square it has been held so many times by
11:02:47 19 both the Supreme Court and the Ninth Circuit.

11:02:50 20 In the *Qualcomm* case, after finding -- making its findings
11:02:55 21 on duty to deal, the Court did turn to anticompetitive harm.
11:03:00 22 And in case as well, Epic cannot show anticompetitive effects,
11:03:04 23 and here we are talking about diminished consumer choice,
11:03:05 24 reduced output, and increased prices.

11:03:08 25 So as I said at the beginning, the type of output that has

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11:03:13 1 been brought by the App Store in an antitrust case is just
11:03:17 2 astounding. Business opportunities have been created for
11:03:22 3 millions of developers and spurred the creation of an entirely
11:03:25 4 new industry related to app development and design. This is
11:03:29 5 the hallmark of competition and what antitrust cases look at.

11:03:33 6 Not only have app downloads increased exponentially, the
11:03:38 7 number of users has dramatically increased. This is a chart
11:03:41 8 that shows developer revenue. Developer revenue has gone
11:03:46 9 dramatically up. And as output has increased, Apple's
11:03:51 10 effective commissions have decreased. Effective commissions
11:03:55 11 for game apps was 8.1 percent for fiscal year 2019, and for
11:04:01 12 all apps it was 4.7 percent.

11:04:05 13 More developers are offering apps for free. Today that
11:04:09 14 number is 84 percent. Epic ignores all free apps.

11:04:13 15 And developers are increasingly taking advantage of
11:04:17 16 monetization options that do not involve commission to Apple,
11:04:23 17 which Apple has made easier to do, like signing up for
11:04:23 18 subscriptions on other platforms, that then you can use on
11:04:27 19 iOS.

11:04:29 20 As Tim Cook said recently, prices have only gone in one
11:04:33 21 direction, and that is down. Apple has reduced commissions
11:04:36 22 for subscriptions, for premium video entertainment, and
11:04:41 23 earlier this year for small businesses, which are businesses
11:04:44 24 making less than \$1 million a year.

11:04:47 25 In an antitrust case no price increase ever is a big deal.

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11:04:51 1 And Epic likes to dismiss this small business program, but
11:04:57 2 even if it doesn't matter to Epic, it does matter to a lot of
11:05:00 3 small businesses. Google thought this was such a good idea
11:05:04 4 that they followed us; another sign of competition.

11:05:07 5 Now, I saw counsel put up on the screen a chart,
11:05:11 6 supposedly about the App Stores' margins. And they are going
11:05:18 7 to pull documents out of context in this case. And this is
11:05:20 8 incredibly misleading.

11:05:23 9 Epic's expert, Mr. Barnes, the accountant, looks only at
11:05:28 10 one segment of the iOS ecosystem. But as our witnesses will
11:05:32 11 explain, Apple's business is integrated. And so Apple does
11:05:35 12 not internally allocate to the App Store most of the cost in
11:05:40 13 running the store. And let me make that very concrete.

11:05:42 14 The Apple software teams, for example, do an enormous
11:05:47 15 amount of engineering work that supports the App Store, like
11:05:51 16 creating those SDKs and those APIs that we talked about that
11:05:55 17 Epic says you couldn't even make an app without that. Without
11:06:00 18 those SDKs and APIs, there wouldn't be any apps in the App
11:06:06 19 Store. But none of those costs are formally allocated to the
11:06:09 20 Store. And instead reflecting its integrated business model,
11:06:12 21 Apple calculates its profits company-wide.

11:06:17 22 So the evidence is going to show tremendous output and
11:06:21 23 reduced prices and consumer choice; no anticompetitive effect.
11:06:25 24 And, in fact, what is on the screen right now is what Epic's
11:06:30 25 economist, Dr. Evans, said in 2011, a year after Epic now

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11:06:36 1 contends our product became anticompetitive. He said, iPhone
11:06:41 2 users have done very well, also as a result of the tens of
11:06:44 3 thousands of applications they can choose from. Some of which
11:06:49 4 enable them to do things that were not possible before. New
11:06:53 5 markets have opened for entrepreneurs. By bringing developers
11:06:58 6 and users together, the iPhone has served as a catalyst, which
11:07:02 7 has created value and profit out of thin air.

11:07:06 8 That's quite an endorsement. In fact, it wasn't just
11:07:12 9 David Evans' opinion in 2011, it was his view last year. Last
11:07:16 10 year he said, there isn't much controversy that Apple's rules
11:07:21 11 have enabled it to create a high-quality app ecosystem for the
11:07:25 12 iPhone.

11:07:26 13 So this time he attributes Apple's high-quality app
11:07:33 14 ecosystem to the very rules Apple is asking this Court to get
11:07:37 15 rid of. This is the person, Your Honor, that Epic's entire
11:07:42 16 antitrust case relies upon. And we are going to cross-examine
11:07:45 17 him.

11:07:46 18 The evidence is also going to show that Apple has a host
11:07:51 19 of procompetitive justifications for the design choices that
11:07:56 20 Epic is asking this Court to get rid of. Now, these are
11:08:00 21 Apple's procompetitive justifications: Consumer trust,
11:08:04 22 security and privacy, reliability, quality, user experience,
11:08:11 23 consumer choice, and protecting our intellectual property.

11:08:15 24 Now, these may sound familiar because they are the
11:08:20 25 principles that form the foundation of Apple's brand. They

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11:08:23 1 are the North Star and the reason that many consumers,
11:08:27 2 including apparently Tim Sweeney, prefer the iPhone. To win
11:08:33 3 this case, Epic would have to convince this Court that every
11:08:38 4 one of these procompetitive justifications is all just a big
11:08:43 5 pretext.

11:08:44 6 Epic really only speaks about security so we will address
11:08:48 7 that one. Epic's argument here is basically why can't you
11:08:53 8 just protect the iPhone like you protect the Mac. Well, Phil
11:08:57 9 Schiller is going to tell you, he was there from the
11:09:00 10 beginning, that even then Apple knew the iPhone was going to
11:09:05 11 be very different than a PC or a Mac. To begin with, it was a
11:09:10 12 phone. It had to work all the time. Like when you're in a
11:09:14 13 medical emergency or you're stuck at the side of the road. So
11:09:18 14 reliability was priority one.

11:09:23 15 And priority two was security. The iPhone keeps our most
11:09:28 16 personal data, our health data, our location, our kid's
11:09:34 17 locations priority one. And priority two, reliability and
11:09:38 18 security. And Apple was not going to sacrifice either one of
11:09:43 19 those.

11:09:44 20 And Epic's question, why not apply the same security from
11:09:48 21 the Mac to the iPhone, shows how truly dangerous their
11:09:53 22 position in this case really is. iOS devices face an
11:09:57 23 extraordinary threat model. There are over 1 billion
11:10:01 24 portable iOS devices with over 1.8 million apps available
11:10:06 25 for download. Each device has a camera and a microphone and a

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GPS that are always present. This threat model is what makes iOS different from macOS.

The iPhone is not a Mac. It is a rare moment when somebody leaves a Mac on a bus or in a movie theater. Your Mac doesn't always know where you are or where your children are.

More devices to attack, more opportunity to attack, more incentive to attack. Take away the security particular to the iPhone and the bad actors are going to have a field day, which is why Android security statistics are so much worse.

Now, the way to combat the threat level to iOS devices is to have multiple layers of security. And as you heard, the iOS itself is one critical layer of security. And Apple's app review is another.

Phil Schiller and Trystan Kosmynka, the head of app review, will take this Court deep inside the app-review process which utilizes highly sophisticated AI and machine review in addition to human review. App review makes sure that the apps perform as expected, that they won't damage your device, that they don't contain any objectionable content or malware, and that these apps are not pirated or copycatted, which is something that Epic really appreciated when app review stopped a copycat app called *FortCraft*.

So it is the human review that really sets app review apart. You need people, not machines, to figure out if the

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11:11:49 1 app is pirated, if it contains hate speech, difficult
11:11:52 2 judgment, or pornography, if it is too violent or offensive
11:11:56 3 for kids, or whether the app doesn't need access to parts of
11:12:00 4 your phone. And when the human reviewers spot new threats,
11:12:04 5 they can get in and change the code used in the electronic
11:12:07 6 review. And so these problems can be caught in the future.
11:12:10 7 And so in this way, app review is learning and getting better
11:12:14 8 all the time.

11:12:15 9 Now, app review doesn't just protect security, it protects
11:12:21 10 reliability and functionality of the phone, priority one and
11:12:24 11 priority two. It protects against bugs and malware and apps
11:12:30 12 that drain your battery, things that consumers do not want.

11:12:33 13 Now, when our expert Dr. Rubinfeld pointed out that rogue
11:12:35 14 apps can hurt consumers and damage the Apple brand, Dr. Evans
11:12:42 15 had this to say. He says, Dr. Rubinfeld simply asserts that
11:12:44 16 there is a rogue developer who lacks incentives to protect
11:12:49 17 users and developers from harm.

11:12:51 18 Well, yes, rogue developers are not rational economic
11:12:55 19 actors. They do lack those incentives, to protect consumers
11:12:59 20 and developers from harm.

11:13:01 21 In security, you are only as strong as your weakest link.
11:13:06 22 Bad actors only need to find one app store with weaker
11:13:12 23 security in order to infiltrate the entire iOS system.

11:13:17 24 Now, a substantial portion of Epic's presentation focused
11:13:20 25 on some individual examples of some things that got through in

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11:13:24 1 the course of nearly 15 years.

11:13:27 2 Each of those examples is an example of why app review is
11:13:30 3 needed. Epic's response to fishing scams is to ask a Court to
11:13:37 4 order us to remove an extra layer of security. So we freely
11:13:43 5 acknowledge app review is not perfect, but those individual
11:13:46 6 and cherry-picked examples should be measured against these
11:13:49 7 overall numbers.

11:13:50 8 There are more than 1.8 million apps in the App Store.
11:13:55 9 100 percent of all apps are automatically screened for known
11:13:59 10 malware. 100,000 are reviewed each week by 500 expert
11:14:05 11 reviewers, and Apple rejects a full 40 percent of apps due to
11:14:09 12 glitches, bugs, or because they compromise user privacy or
11:14:10 13 security. And it sounded like Epic thought that was a bad
11:14:15 14 thing, but consumers think it's a good thing because it makes
11:14:19 15 the products better.

11:14:20 16 Epic also showed you some negative quotes from surveys
11:14:22 17 that Apple does of its developers. Now, those same documents
11:14:25 18 contained quotes that Epic doesn't want to show you.

11:14:29 19 Developers who say, I gave the App Store a high rating. I
11:14:33 20 love the new design of the App Store. As a consumer, the App
11:14:37 21 Store has become a really great destination. The developer
11:14:41 22 process is great. Keep up the great work that led to 24-hour
11:14:44 23 and less review times. Overall it's been a great experience.

11:14:48 24 Those are all from separate developers. And there are
11:14:51 25 many more that I can read this Court.

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11:14:53 1 So the point of this is not that there are some strongly
11:14:56 2 positive or strongly negative comments among thousands of
11:15:00 3 developers who have been surveyed, of course there are. The
11:15:04 4 point is that Apple collects this feedback from developers,
11:15:07 5 escalates all the way up the top of the chain, top of the
11:15:11 6 company, to the executives so that they can make the business
11:15:14 7 decisions that will make the products better.

11:15:16 8 And the proof is in the pudding. Epic is effectively
11:15:20 9 saying to Apple in this case, why can't you just allow
11:15:25 10 sideloading like Android does. They are asking us to remove a
11:15:29 11 competitive advantage.

11:15:29 12 Epic wants us to be Android, but we don't want to be. And
11:15:33 13 our consumers don't want that either. They want the choice.

11:15:37 14 Look at the sentence from Epic's conclusions of law. They
11:15:42 15 say, at most, app review provides an additional layer of
11:15:46 16 security by filtering out obviously malicious or otherwise
11:15:50 17 dangerous apps.

11:15:52 18 Even if this one sentence that Epic grudgingly concedes is
11:15:57 19 true, this alone would show that the reasons for what Apple is
11:16:02 20 doing is real and not a pretext.

11:16:05 21 And while Epic says at most, most people would think
11:16:09 22 filtering out malicious and dangerous apps is pretty
11:16:16 23 important.

11:16:16 24 So finally, Your Honor, moving on to Epic's tying claim,
11:16:20 25 under the law a tie only exists where buyers are required to

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11:16:24 1 take a product. There are two problems with this: One is
11:16:29 2 that IAP is not a product, and the second is that it is not
11:16:33 3 required.

11:16:34 4 As the Court has already said in the PI order, the IAP
11:16:41 5 system appears to be integrated with the App Store and
11:16:42 6 historically to have never been a separate product. So the
11:16:47 7 evidence will show that that is right. IAP has never been
11:16:51 8 offered, marketed, or sold separately by Apple. It is not a
11:16:54 9 separate product.

11:16:55 10 And this makes sense because IAP is not a product at all.
11:17:00 11 It is not, for example, a payment processor, as Epic likes to
11:17:05 12 insist. Apple actually outsources payment processing to a
11:17:10 13 third party, which in the United States is Chase Bank. So IAP
11:17:14 14 is a complex functionality that performs various steps,
11:17:17 15 including account checks, presale checks, and fraud checks to
11:17:22 16 make sure that when a consumer and a developer engage in a
11:17:25 17 digital transaction through the App Store, that transaction is
11:17:29 18 as seamless and legitimate as possible. That transaction
11:17:33 19 takes place on the device.

11:17:36 20 IAP is also the most efficient way for Apple to collect
11:17:40 21 its commission. As the Apple executives will explain, there
11:17:46 22 are many ways to build a business. And IAP was the one that
11:17:50 23 they chose to monetize the App Store because it best reflected
11:17:53 24 the relationship that Apple wanted to have with consumers and
11:17:57 25 developers. And it worked.

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For consumers, it reduces frictions so that consumers don't have to enter their financial information all over the place. It means that Apple doesn't make money unless its developers make money, which aligns incentives. And it means that many apps in the App Store can be free, which helps attract more consumers to the store, which boosts revenue for all developers.

Apple was not the first to do this and it wasn't the last. There are many companies that do something similar.

So not only is IAP not a product, it is also not required. It is the developers' choice how they want to monetize their apps, and plenty do not choose in-app purchase. They can choose paid advertising or other promotions, and Epic knows this because it monetizes *Fortnite* in some of these other ways as well.

The truth, Your Honor, is that Epic's tying claim is really just an attack on Apple's 30-percent commission that Epic does not want to pay. And if that weren't already obvious, the Project Liberty document say this in black and white.

But while IAP functionality may be the most efficient way to collect the commission, it is not the commission itself. In a world without IAP, Apple would still be entitled to collect a commission and developers would have to pay extra for the payment processing costs that Apple now covers. Costs

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11:19:31 1 would go up.

11:19:33 2 Those costs can be passed down to consumers, who would
11:19:36 3 also confront more friction when making transactions, which in
11:19:42 4 turn would be bad also for developers. So that is not a world
11:19:45 5 where consumers or developers would be better off.

11:19:52 6 And it is not just with IAP, but in general. Epic's
11:19:58 7 requested relief will harm consumers and developers. And this
11:20:02 8 point can perhaps be best made by asking ourselves the
11:20:06 9 question, what would have happened if Epic had been granted
11:20:10 10 the relief they seek today way back in 2010 when Epic now says
11:20:16 11 that Apple's conduct was an antitrust violation because of its
11:20:18 12 own enforcement of its own guidelines in its own store.

11:20:24 13 We know what did happen, reflected on this chart, based on
11:20:29 14 trust that Apple has been able to build with its consumers,
11:20:30 15 but what if none of this had ever happened. Or this. Or
11:20:37 16 this.

11:20:37 17 And what about the next 10 years? What will Apple's
11:20:43 18 commitment to maintaining the security, safety, and privacy of
11:20:47 19 the App Store to maintaining the trust it has built with
11:20:51 20 consumers, what will that bring over the next 10 years?

11:20:55 21 Well, Epic's requested relief will make sure that none of
11:20:59 22 us ever finds out.

11:21:02 23 And here is another problem: If Epic prevails, other
11:21:07 24 ecosystems will fall too. As the Court noted in her PI order,
11:21:14 25 Sony, Nintendo, and Microsoft all operate similar platform

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models to Apple. The Court wanted to assess whether there would be serious ramifications for those businesses as well.

Well, the evidence will show that there would be. We asked Mr. Sweeney if he thought that console manufacturers were monopolists in their own product, and he said yes. And it is true.

If Epic can prevail on its theory, there will be nothing to distinguish any of these transaction platforms. They all charge the same commission. They nearly all prohibit sideloading or third party app stores or both, and they all facilitate in-app purchases.

Mr. Sweeney's personal preference that all platforms be open is directly contrary to what the antitrust laws say is procompetitive. And the law protects Apple's choice to have an integrated system, just like it protects Sony and Nintendo.

And so at the end of the day, Your Honor, to win this case, Epic is going to have to convince this Court of so many things that don't make any sense; that the same games being played by the same people at the same time should not be grouped together, that a business model praised just last year by Epic's lead economist should be invalidated based on the testimony from that same economist, and that Apple's brand of defining commitment to safety, security, reliability, and quality are all just a big pretext.

But the most dangerous thing that Epic is going to try to

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1 sell the Court is the idea that consumers would be better off
2 if Epic had its way. Nothing could be further from the truth.
3 Epic speculates about a world where Apple was a different
4 company and is asking this Court to make a big bet that that
5 world is a better world than the one we live in. It isn't.

6 The result for consumers and developers will be less
7 security, less privacy, less reliability, lower quality and
8 less choice. And those are the very things that the antitrust
9 laws seek to protect.

10 Your Honor, we look forward to presenting our case to you.

11 **THE COURT:** All right. Thank you, Ms. Dunn.

12 Ms. Forrest, your first witness.

13 **MS. FORREST:** Thank you, Your Honor --

14 **THE COURT:** Ms. Forrest, just give me a moment.

15 Ms. Forrest.

16 (Pause in the proceedings.)

17 **THE CLERK:** Okay.

18 **MS. FORREST:** Epic calls Mr. Timothy Sweeney.

19 **THE COURT:** Good afternoon, Mr. Sweeney.

20 **THE WITNESS:** Good afternoon.

21 **THE CLERK:** All right.

22 (TIMOTHY SWEENEY, called as a witness for the Plaintiff,
23 having been duly sworn, testified as follows:)

24 **THE WITNESS:** I do.

25 **THE CLERK:** Please state your full name and spell

11:25:22 1 your last name.

11:25:23 2 **THE WITNESS:** Timothy Dean Sweeney.

11:25:26 3 **THE CLERK:** I am sorry. You can be seated to do
11:25:27 4 that, into the mic.

11:25:29 5 **THE WITNESS:** Timothy Dean Sweeney. S-W-E-E --

11:25:34 6 **THE CLERK:** Let me turn on your mic.

11:25:36 7 **THE COURT:** Now, let's try.

11:25:38 8 **THE WITNESS:** Timothy Dean Sweeney. S-W-E-E-N-E-Y.

11:25:43 9 **THE COURT:** We heard you, but --

11:25:45 10 **THE CLERK:** Wrong mic. Sorry.

11:25:48 11 **THE WITNESS:** I'm Timothy Dean Sweeney.
11:25:48 12 S-W-E-E-N-E-Y.

11:25:54 13 **THE COURT:** All right. Thank you. You may proceed.

11:25:56 14 **DIRECT EXAMINATION**

11:25:56 15 **BY MS. FORREST:**

11:25:56 16 **Q.** Good morning, Mr. Sweeney. Where do you live, sir?

11:25:59 17 **A.** I live in Cary, North Carolina.

11:26:10 18 **Q.** And by whom are you employed?

11:26:13 19 **A.** I work with Epic Games Incorporated.

11:26:16 20 **Q.** And what is your position with Epic?

11:26:17 21 **A.** I am the CEO and founder of the company.

11:26:20 22 **Q.** And did you have anything to do with the decision by Epic
11:26:23 23 to sue Apple in the case that has brought us here to trial
11:26:26 24 today?

11:26:27 25 **A.** Yes, as the CEO of Epic, it was my decision.

11:26:30 1 Q. All right. And without giving me any legal advice that
11:26:33 2 you may have received, can you tell me what led Epic to sue
11:26:37 3 Apple?

11:26:38 4 A. Certainly. Epic had been working in the iOS FS system
11:26:42 5 since around 2010. We loved it in the early days. However,
11:26:46 6 the following decade became increasingly apparent that Apple's
11:26:52 7 control of the ecosystem was increasing prices and restraining
11:26:58 8 developers from realizing their creative visions. This lead
11:27:02 9 to a series of conversations that Epic attempted to have with
11:27:07 10 Apple executives a number of times, starting in 2015 and going
11:27:12 11 onward, none of which ever really connected with Apple. They
11:27:14 12 were never willing to have high-level discussions with us.

11:27:17 13 So in June of 2020 I believe I sent a letter to Tim Cook
11:27:24 14 just stating Epic's immediate concerns in the form of several
11:27:29 15 requests of Apple, which I received a reply of -- about in
11:27:33 16 July, refusing all of them. And that led to my decision to
11:27:40 17 launch Project Liberty and to confront Apple publicly.

11:27:45 18 Q. All right. And were there any particular Apple policies
11:27:48 19 with which Epic disagreed at that time?

11:27:53 20 A. Yes, the two that really stand out are Apple's --

11:27:57 21 THE COURT: I am going to interrupt only when I don't
11:28:00 22 have a clear understanding of something in the question. And
11:28:03 23 this will be consistent throughout the trial.

11:28:06 24 So are you asking him for his view as of the 2020 letter
11:28:14 25 to Apple or when Project Liberty started, which I understand

11:28:17 1 to be substantially before that?

11:28:20 2 **MS. FORREST:** Thank you, Your Honor. Let me perhaps
11:28:22 3 reword the question.

11:28:25 4 **BY MS. FORREST:**

11:28:25 5 **Q.** Mr. Sweeney, at the time Epic sued Apple, were there
11:28:28 6 specific policies with which you disagreed?

11:28:31 7 **A.** Yes. The two major disagreements were Apple's policy
11:28:34 8 prohibiting competing stores from existing in iOS, and Apple's
11:28:39 9 policy requiring that all payments for digital goods in iOS
11:28:42 10 apps used in that purchase and paid to Apple at a 30-percent
11:28:46 11 commission.

11:28:46 12 **Q.** All right. Now let's back up a little bit.

11:28:48 13 When did you first have your earliest experience working
11:28:52 14 with an Apple device?

11:28:56 15 **A.** Around 1983. I was 12 years old and my brother had given
11:29:00 16 my family an Apple II Plus computer, which I learned to
11:29:04 17 program on. That was my first experience with Apple.

11:29:09 18 **Q.** When did you found the Epic company?

11:29:12 19 **A.** I started Epic Games in 1991.

11:29:15 20 **Q.** And when did you first have any app that you released
11:29:21 21 through the Apple App Store?

11:29:25 22 **A.** Epic Games in 2010 when the iPhone 3GS came out was the
11:29:34 23 first amazing 3D capabilities in the mobile device, Epic began
11:29:39 24 making our *Unreal Engine* technology work on iPhone devices.
11:29:43 25 We initially released a technology demo called *Epic Citadel*,

11:29:48 1 followed by our first iOS game release called *Infinity*
11:29:53 2 *Blade*, I believe in 2010.

11:29:55 3 **THE COURT:** So you said Epic *Citadel*, and the next
11:29:58 4 one?

11:30:00 5 **THE WITNESS:** *Infinity Blade*.

11:30:00 6 **BY MS. FORREST:**

11:30:05 7 **Q.** And between 2010 and 2020 did you perceive to be -- there
11:30:14 8 to be any changes in Apple policies?

11:30:18 9 **A.** Yes. Throughout that period I had initially been a fan of
11:30:22 10 the iPhone model. But over time, the policies became more and
11:30:30 11 more restrictive. Apple -- I am sorry, Apple continually
11:30:39 12 ratcheted up the restrictions and developers, both through the
11:30:43 13 policy statements and in the enforcement of them.

11:30:48 14 And at one point I think that one of the things that made
11:30:51 15 the biggest impression on me was when Apple entered a search
11:30:57 16 ad so that when a user searching for *Fortnite* saw an ad for a
11:31:03 17 third-party game come up above the listing for *Fortnite*, it
11:31:07 18 created a very severe frustration with Apple's approach.

11:31:12 19 **Q.** If there were issues with Apple policies in 2010 -- were
11:31:18 20 there any issues with Apple policies in 2010?

11:31:22 21 **A.** Epic, they didn't initially take a critical review of
11:31:26 22 Apple's policies at that point in time.

11:31:29 23 **Q.** Why did Epic wait until 2020 to sue Apple?

11:31:33 24 **A.** It took me a very long time to come to a realization of
11:31:36 25 all the negative impacts of Apple's policy. And in particular

11:31:39 1 I was -- in the very early days of iPhone, iPhone games were
11:31:42 2 built by a team of just a few people, and to reach a large
11:31:47 3 audience. And it would be very lucrative for developers.

11:31:50 4 But over that period, again, and at competition, grew
11:31:55 5 dramatically as the number of apps increased. There were many
11:31:59 6 products being developed by teams of a hundred or more
11:32:02 7 engineers or developers. The economic model had changed such
11:32:07 8 that the average developers' profit margin in my experience
11:32:10 9 was well under 30 percent. And so we got to a point where
11:32:12 10 Apple was making more profit from selling a developer's app on
11:32:18 11 the App Store than the developer was typically making
11:32:21 12 themselves.

11:32:22 13 **MR. DOREN:** Objection. Move to strike. Lack of
11:32:24 14 foundation as to "other developers."

11:32:27 15 **THE COURT:** Sustained.

11:32:27 16 **BY MS. FORREST:**

11:32:28 17 **Q.** Mr. Sweeney, we will just be asking sort of about your
11:32:31 18 particular experience with regards to Epic. And let me just
11:32:36 19 move on to the next question.

11:32:38 20 In your view, has Epic been harmed by Apple's policies as
11:32:42 21 they existed at the time this lawsuit was filed in August of
11:32:46 22 2020?

11:32:47 23 **A.** Yes.

11:32:48 24 **Q.** And can you please explain to the Court how Epic has been
11:32:52 25 harmed?

11:32:53 1 **A.** Well, there are a number of areas. First of all, Apple's
11:32:57 2 required use of In-App Purchase reduces the quality of the
11:33:01 3 support that we can provide to customers. Epic doesn't have
11:33:05 4 the ability to issue refunds to customers, and so if a
11:33:08 5 customer has a problem, we can't service them directly. We
11:33:11 6 have to refer them directly to Apple, to talk to Apple
11:33:16 7 instead.

11:33:17 8 Also Apple is in possession of this 30-percent commission.
11:33:23 9 In my experience is a really significant economic drag on the
11:33:27 10 economics of the products, which certainly impacted Epic's
11:33:34 11 pricing decisions and led to -- the ability to let -- reinvest
11:33:42 12 less in our business than we otherwise would have been able to
11:33:45 13 if the commission weren't present.

11:33:47 14 And Apple has also imposed a myriad of policies on
11:33:50 15 individual features of our products, which have restricted
11:33:53 16 them from achieving the sort of vision that we originally had
11:33:58 17 for them, and in some cases prevented us from doing things
11:34:02 18 which we did on other platforms with great success that were
11:34:04 19 loved by customers.

11:34:04 20 Apple's policies had, in many ways, prevented us from
11:34:18 21 implementing the sorts of features that we wanted in *Fortnite*
11:34:21 22 that we had been able to implement on other platforms.

11:34:26 23 **Q.** Is Epic seeking damages in this lawsuit?

11:34:30 24 **A.** No. Epic is solely seeking changes to Apple's future
11:34:35 25 behavior.

11:34:36 1 Q. Have you ever heard of the term "special deal"?

11:34:38 2 A. Yes.

11:34:38 3 Q. Is Epic seeking a special deal from Apple in connection
11:34:43 4 with the filing of this lawsuit?

11:34:45 5 A. No, the remedies of it that we are seeking here are the
11:34:46 6 changes to Apple's behavior that would affect the entire
11:34:52 7 market, and all participants in it.

11:34:52 8 Q. Is there any portion of the remedy that Epic is seeking
11:34:56 9 that is asking for app review to go away?

11:35:01 10 A. No. With respect to apps distributed through the iOS
11:35:06 11 App Store, I'm a supporter of Apple's freedom to review apps.

11:35:11 12 Q. And is there any portion of the remedy that Epic is
11:35:15 13 seeking that is seeking to have Apple's In-App Purchase
11:35:21 14 functionality go away?

11:35:23 15 A. No. I support Apple's right to offer a purchasing system
11:35:28 16 to developers that they may use with consumers. Epic is
11:35:34 17 simply seeking the ability for other payment systems to
11:35:37 18 compete with among iOS so that developers can choose freely
11:35:42 19 among them.

11:35:43 20 Q. All right. And we are going to turn for a moment to
11:35:46 21 Epic's business.

11:35:47 22 Can you describe for the Court as of today what is Epic's
11:35:51 23 business?

11:35:53 24 A. Epic is in a variety of businesses all tied to the common
11:35:59 25 theme of building and supporting real-time 3D content, both

11:36:05 1 through consumer products and to developers, and to other --
11:36:09 2 and other services that socially connect users together. The
11:36:15 3 three major areas of our business are consumer products, such
11:36:20 4 as *Fortnite*, *Rocket League* and *Houseparty*.

11:36:26 5 Product team directed at developers which enabled them to
11:36:29 6 develop their own apps or games, such as *Unreal Engine* and
11:36:35 7 Epic Online Services. And we also operate a digital store
11:36:42 8 that connects developers with PC and Mac games to consumers on
11:36:49 9 the PC and Mac platform called the Epic Games Store.

11:36:53 10 **Q.** All right. We will come back to some of these in a
11:36:55 11 moment. But can you describe generally who some of Epic's
11:36:59 12 competitors are in its various lines of business?

11:37:02 13 **A.** Certainly.

11:37:02 14 In the area of our consumer apps, our competitors range
11:37:07 15 from other social ecosystem companies, such as Facebook or
11:37:14 16 Roblox, to other game developers such as Activision or
11:37:23 17 Electronic Arts.

11:37:25 18 In our business targeting developer tools, our *Unreal*
11:37:30 19 *Engine* business, and Epic Online Services business, our
11:37:36 20 competitors include Unity, a maker of another 3D engine, and
11:37:41 21 Microsoft and Amazon who build similar online service, SDKs.

11:37:46 22 And with respect to the Epic Games Store and the PC and
11:37:52 23 Mac market, our competitors include stores that publish games
11:37:56 24 for many publishers. Stores that distribute games for many
11:38:02 25 publishers, such as Steam and Good Old Games, to proprietary

stores run by publishers themselves, such as Electronic Arts' origin service, and Activision's Blizzard service.

Q. Is Apple a competitor of Epic in any way?

A. Apple is a competitor of Epic in a number of businesses in various ways.

Q. And can you describe some of those please?

A. Certainly.

Apple has an expanded role in publishing and distributing iOS games to Apple --

Q. Did you say "publishing industry"?

A. Sorry. Apple operates Apple Arcade, a subscription game service, which to some extent competes with Epic's products.

Apple provides SDKs of various sorts, such as sign in with Apple, which to some extent competes with Epic's account system.

Q. All right. And in terms of the distribution of apps, is there any competition between Epic and Apple?

A. There is not, because Apple bars us from operating a store, a digital app store that could operate on the iOS platform.

Q. Now --

A. I am sorry. Can I correct?

However, Apple also operates the Mac App Store. And the Epic Games Store is, to some extent, in competition with the Mac App Store in that we both sell products to the same game

11:39:41 1 users.

11:39:42 2 **Q.** You mentioned earlier in one of your answers the word

11:39:44 3 "publisher." What does the word "publisher" mean in

11:39:48 4 connection with apps?

11:39:50 5 **A.** Well, publisher provides a full-service relationship with

11:39:53 6 a developer. Publisher typically funds development of a game

11:40:00 7 or app to some extent. The publisher provides all the

11:40:04 8 marketing service, or most of the marketing services for the

11:40:08 9 app and funds the marketing. And the publisher participates

11:40:14 10 in the distribution of the product to consumers, either by

11:40:17 11 directly distributing it or by working with distributors who

11:40:21 12 distribute the app.

11:40:22 13 **Q.** So now you've used the word "distributors" and publishers

11:40:27 14 working with distributors. What is a distributor in so far as

11:40:29 15 it's distinct, if it is, from a publisher?

11:40:32 16 **A.** A distributor is a company that is in the more narrow

11:40:35 17 business of making software programs available to consumers.

11:40:42 18 In the old days this was through retail distribution. In

11:40:46 19 modern day, this is distribution through stores, such as the

11:40:51 20 iOS App Store or the Epic Games Store.

11:40:56 21 **Q.** And are you aware of any business model differences

11:40:56 22 between a publisher of apps and a distributor of apps?

11:41:01 23 **A.** Yes, these are entirely different businesses with

11:41:03 24 different costs. A publisher typically funds most or all of

11:41:09 25 the expenses associated with the entire product, including

development and marketing; whereas, a distributor typically only pays the cost associated with direct distribution, such as in the digital word bandwidth and payment with processing fees.

Q. A moment ago in some of your testimony you described the various parts of Epic's business.

Have -- can you describe for the Court which of those parts, if any, have been harmed by the Apple policies that you filed the lawsuit with regard to August of 2020?

A. Apple's policies harm every facet of our business. As I described earlier, they harm our consumer products and game business by restricting sorts of features we cannot test with consumers, the quality of service we can offer, and imposing a commission structure that tends to inflate prices of goods.

Apple's policies harm our technology business in this particular case because Apple has threatened to remove the *Unreal Engine* -- sorry, Apple has threatened to remove Epic's ability and access to its APIs to continue developing the *Unreal Engine* for iOS and Mac devices, which would mean if we could no longer develop our software, then it would, you know, become obsolete relatively quickly and we couldn't provide proper support to our customers, and our customers would no longer rely on us as the supplier of that software.

And finally our Epic Games Store business is harmed by Apple's policies because we are barred from introducing a

11:42:58 1 version of our store for iOS. So we can operate on PC and
11:43:02 2 Mac, but we cannot, because of Apple's policies, distribute
11:43:06 3 apps on iOS, and that locks us out of a very large worldwide
11:43:13 4 business we would love to be in.

11:43:15 5 **Q.** Let's talk now about *Fortnite*. What is *Fortnite*?

11:43:19 6 **A.** *Fortnite* is a phenomena that transcends gaming. It's a
11:43:24 7 social entertainment experience. It includes a variety of
11:43:29 8 gaming experiences and also nongaming experiences within it.

11:43:34 9 **Q.** And when was *Fortnite* first launched on any platform?

11:43:40 10 **A.** Well, *Fortnite* went through some private data tests 2015
11:43:46 11 and 2016, but it launched to the public in 2017.

11:43:50 12 **Q.** All right. And you just mentioned that *Fortnite* has both
11:43:54 13 gaming and nongaming aspects. What aspects of *Fortnite* are
11:44:01 14 nongaming, if you can describe them?

11:44:05 15 **A.** Certainly.

11:44:05 16 *Fortnite* has a mode called *Fortnite Party Island*, which
11:44:11 17 includes a variety of entertainment experiences. Some are
11:44:16 18 gaming but others are not gaming related at all. We have held
11:44:20 19 concerts within *Fortnite*. We have held previews of -- we've
11:44:28 20 held -- we've showed several feature-length films within
11:44:33 21 *Fortnite* that people could watch, sort of like a real-time 3D
11:44:37 22 social session where you're watching something like a Netflix
11:44:40 23 movie. And we posted a number of other events, including
11:44:47 24 Short Night, an event where we showed some short films created
11:44:53 25 by Indie filmmakers. And we hosted some conversation, a

11:44:54 1 prerecorded social dialogue that players can visit and listen
11:45:03 2 to and also talk about socially within the 3D world of
11:45:05 3 *Fortnite*.

11:45:06 4 **Q.** What are some of the game aspects of *Fortnite*?

11:45:10 5 **A.** Our most popular gaming experience in *Fortnite* is
11:45:13 6 *Fortnite's Battle Royale* mode. This is a 100-player
11:45:18 7 experience where lone players or duos or squad drop into the
11:45:25 8 island together and fight, using fairly traditional gaming
11:45:30 9 mechanics within the world of *Fortnite* until one team prevails
11:45:33 10 at the end of the match.

11:45:35 11 **Q.** All right. Now, is there a word or term in the industry
11:45:40 12 that you're aware of for this kind of user experience, this
11:45:43 13 game and nongame user experience?

11:45:46 14 **A.** Yes. The industry has come to call this new medium that's
11:45:50 15 emerging "the metaverse."

11:45:57 16 **Q.** And how would you define the metaverse?

11:46:02 17 **A.** The metaverse was defined in early science fiction
11:46:05 18 literature in a novel such as *Snow Crash*, which posited a
11:46:11 19 future real-time computer-powered 3D entertainment and social
11:46:18 20 medium in which real people would go into a 3D simulation
11:46:23 21 together and have experiences ranging of all sorts, from
11:46:27 22 social to gaming.

11:46:30 23 **Q.** Is game playing necessary to the metaverse or not
11:46:33 24 necessary to the metaverse?

11:46:36 25 **A.** No. In the metaverse, and in experiences like *Fortnite*,

11:46:39 1 participants, players if you call them, can go together and
11:46:44 2 have a purely social experience, watch a concert or just hang
11:46:49 3 out and chat. Be there are many ways to engage which do not
11:46:54 4 require playing a game.

11:46:56 5 **Q.** How many users does *Fortnite* have today, approximately?

11:47:00 6 **A.** *Fortnite* has had over 400 million users experience the
11:47:05 7 world of *Fortnite* in its lifetime.

11:47:07 8 **Q.** And in August of 2020, what was the trajectory of the
11:47:15 9 users for *Fortnite*?

11:47:18 10 **MR. DOREN:** Objection, Your Honor. Calls for
11:47:19 11 speculation.

11:47:20 12 **BY MS. FORREST:**

11:47:20 13 **Q.** Mr. Sweeney, are you familiar with information relating to
11:47:24 14 user usage of *Fortnite*?

11:47:27 15 **A.** Yes.

11:47:27 16 **Q.** And how do you obtain that information?

11:47:30 17 **A.** The *Fortnite* business and analytics team tracks --

11:47:34 18 **THE COURT:** The business and what?

11:47:36 19 **THE WITNESS:** Analytics.

11:47:36 20 Sorry. Team tracks daily or monthly and other usage
11:47:45 21 statistics on *Fortnite*.

11:47:46 22 **BY MS. FORREST:**

11:47:47 23 **Q.** And do you review those statistics from time to time in
11:47:49 24 connection with your duties and responsibilities?

11:47:51 25 **A.** Yes.

11:47:52 1 Q. Are you familiar in a general sense with the trajectory of
11:47:56 2 usage of *Fortnite* over time?

11:47:57 3 A. Yes.

11:47:58 4 Q. Let's focus on the time period of 2020. Let's start in
11:48:01 5 the 2020 sort of January time frame.

11:48:04 6 Can you give me a general sense of the trajectory of
11:48:07 7 *Fortnite* usage from then until the filing of the lawsuit in
11:48:11 8 August of that year?

11:48:14 9 A. Yes. *Fortnite* was generally growing in that time frame.

11:48:18 10 Q. Now, let's talk about some of -- well, actually before I
11:48:24 11 get there, how many users were in *Fortnite* in approximately
11:48:30 12 2018? If you know.

11:48:36 13 A. I am sorry, I don't really remember the number.

11:48:38 14 Q. Do you know whether it was more or less than the number
11:48:40 15 that exists in *Fortnite* -- or the usage of *Fortnite* today?

11:48:45 16 A. It was fewer.

11:48:46 17 Q. Okay. Now, let's talk about some of the concerts that you
11:48:49 18 mentioned have occurred within *Fortnite*. Can you remind us of
11:48:54 19 the portion of the *Fortnite* app that the concerts occurred
11:48:59 20 within?

11:49:02 21 A. Certainly.

11:49:03 22 *Fortnite* concerts have occurred both within the *Fortnite*
11:49:07 23 battle -- actually -- I am sorry, backing up.

11:49:10 24 Our first concert was with a musician Marshmello.

11:49:17 25 Q. Before we even get there, which *Fortnite* -- you said

11:49:21 1 *Battle Royale, Party Royale, and the Creative Mode, which of*
11:49:27 2 *those three, if any, of the portions of Fortnite hosted the*
11:49:32 3 *concerts?*

11:49:33 4 **A.** Most of our concerts have been *Fortnite Party Royale*. One
11:49:39 5 of our major concerts was in a new mode that we created just
11:49:43 6 for it, and I believe our original Marshmello concert, to the
11:49:47 7 best of my recollection, took place within the *Battle Royale*
11:49:50 8 island.

11:49:51 9 **Q.** All right. And have there been any concerts other than
11:49:53 10 the Marshmello concert that you just mentioned?

11:49:59 11 **A.** Yes, we have had numerous concerts.

11:50:02 12 **Q.** Have any of the concerts involved non-cartoon characters
11:50:09 13 performing?

11:50:11 14 **A.** Yes. Many of our concerts in *Fortnite Party Island* have
11:50:16 15 taken place on our video screen in which the musicians
11:50:21 16 themselves as humans appeared through the video stream while
11:50:27 17 *Fortnite* players participated as virtual 3D avatars.

11:50:30 18 **Q.** And is there any competitive game play that occurs when
11:50:33 19 these concerts are occurring?

11:50:35 20 **A.** No. The concert-viewing experience is purely a social
11:50:40 21 music listening experience and doesn't involve winning or
11:50:44 22 losing.

11:50:45 23 **Q.** You've also mentioned that there were some movies that
11:50:47 24 were hosted within *Fortnite*. Can you describe what some of
11:50:50 25 those movies were?

11:50:52 1 A. Yes. We hosted three Christopher Nolan films --

11:51:01 2 THE COURT REPORTER: I'm sorry?

11:51:04 3 THE COURT: You hosted a what?

11:51:04 4 MS. FORREST: Three Christopher Nolan --

11:51:04 5 THE COURT: Mr. Sweeney, I'm going to do a test. I'm
11:51:09 6 hearing that the media on the phone line is having a difficult
11:51:12 7 time hearing you.

11:51:13 8 So you may be too close to the mic. So let's just do a
11:51:17 9 test.

11:51:18 10 Can you ask him a simple question, Ms. Forrest?

11:51:20 11 BY MS. FORREST:

11:51:21 12 Q. Oh. Mr. Sweeney, whose films were being hosted?

11:51:29 13 A. Christopher Nolan's films.

11:51:31 14 Q. All right. And how many of those films were hosted within
11:51:34 15 *Fortnite*?

11:51:35 16 A. Three films were.

11:51:38 17 THE COURT: Let's keep it at this for a while. I
11:51:39 18 will let you know -- I will interrupt again if I get more
11:51:42 19 feedback.

11:51:43 20 MS. FORREST: All right. We will try to be sort of
11:51:45 21 shorter, and we will be able to articulate more to make sure
11:51:49 22 that we are able to capture the sound appropriately.

11:51:53 23 BY MS. FORREST:

11:51:53 24 Q. And was there any competitive game play that was
11:51:56 25 associated with those films?

11:51:58 1 A. No.

11:51:59 2 Q. Were those films only portions of films or were they an
11:52:03 3 entire film?

11:52:04 4 A. These were full feature-length films.

11:52:08 5 Q. Is there any other film entertainment that has been hosted
11:52:12 6 within *Fortnite*?

11:52:13 7 A. Yes. We also hosted an event called Short Night, in which
11:52:17 8 we hosted several short films, three- to five-minute segments,
11:52:25 9 created by Indie filmmakers.

11:52:28 10 Q. And when did the films, when were they hosted over
11:52:31 11 *Fortnite*? Over what period of time, generally speaking?

11:52:34 12 A. I believe these occurred over the last year and a half.

11:52:36 13 Q. And in terms of the concerts, generally speaking over what
11:52:39 14 period of time did those concerts occur?

11:52:42 15 A. Over a period of, I believe, at least two years.

11:52:45 16 Q. And has *Fortnite* hosted any television shows?

11:52:49 17 A. Yes. We hosted at least -- at least two.

11:52:56 18 Q. Can you recall the names of the two television shows that
11:52:59 19 *Fortnite* hosted?

11:53:00 20 A. Yes. One was ESPN, *The Ocho*.

11:53:06 21 Q. O-C-H-O?

11:53:12 22 A. Yes.

11:53:13 23 Q. And can you recall the name of the other one?

11:53:15 24 A. I believe it was Discovery Channel's *Tiger Shark King*.

11:53:19 25 Q. Okay. And can you recall approximately when those

11:53:22 1 occurred?

11:53:24 2 **A.** Over the past 18 months I believe.

11:53:26 3 **Q.** Had there been any forms of community conversation within
11:53:30 4 *Fortnite*?

11:53:32 5 **A.** Yes. We hosted an event called We the People. It
11:53:38 6 presented a pre-filmed dialogue on racial equality and voter
11:53:46 7 suppression in the United States. And *Fortnite Party Island*,
11:53:49 8 in which participants could stand around in social groups,
11:53:53 9 they could talk to each other through voice chat while
11:53:57 10 listening to the presentation.

11:53:58 11 **Q.** Was there any competitive game play in connection with the
11:54:02 12 We the People community conversation?

11:54:04 13 **A.** No.

11:54:04 14 **Q.** Was there any competitive game play in connection with the
11:54:07 15 television shows that *Fortnite* hosted?

11:54:10 16 **A.** No.

11:54:11 17 **Q.** Are there any other noteworthy events that have occurred
11:54:14 18 within *Fortnite* that did not involve -- strike that.

11:54:17 19 Were there any other noteworthy events that have occurred
11:54:20 20 within *Fortnite*?

11:54:22 21 **A.** Yes. *Fortnite* evolves through a series of seasons, and
11:54:28 22 several seasons have ended in major cinematic events. One was
11:54:34 23 a cinematic event in Marvel Universe, and the other was a
11:54:40 24 cinematic event in which the world of *Fortnite* was followed by
11:54:43 25 a black hole, and the players were left for a few days to

11:54:48 1 wonder what would happen next right before *Fortnite* Chapter 2
11:54:52 2 launched.

11:54:53 3 Q. All right. Are you familiar with the term "updates"?

11:54:55 4 A. Yes.

11:54:55 5 Q. Is *Fortnite* updated from time to time?

11:54:58 6 A. Yes. We generally make a major update to *Fortnite* every
11:55:03 7 two weeks.

11:55:03 8 Q. What does that mean? What does it mean to update
11:55:07 9 *Fortnite*?

11:55:07 10 A. Well, the world of *Fortnite* is constantly evolving. There
11:55:10 11 are new faces appearing in the world, new forms of game play
11:55:18 12 and other behavior constantly coming in every time. And these
11:55:22 13 updates are critical for Epic to deliver all this new
11:55:26 14 functionality to participant -- to *Fortnite* participants.

11:55:30 15 Q. Are you familiar with the term "cross-play"?

11:55:32 16 A. Yes.

11:55:33 17 Q. What does that mean?

11:55:35 18 A. Cross-play refers to the ability of one player on one
11:55:39 19 device to participate in a shared session in the *Fortnite*
11:55:44 20 world together with other people on other platforms, such as
11:55:48 21 the ability for an iOS player to play in *Fortnite* in the
11:55:53 22 same world as a PlayStation player.

11:55:55 23 Q. And does *Fortnite*, has it supported cross-play over time?

11:56:01 24 A. Yes.

11:56:01 25 Q. And did it play any role -- did Epic play any role in the

11:56:07 1 adoption of cross-play?

11:56:08 2 **A.** Yes. When *Fortnite* was released in 2017, a couple of the
11:56:14 3 console platforms had restrictions on cross-play, and Epic
11:56:24 4 went through a series of negotiations with Microsoft and with
11:56:28 5 Sony over the period of 2018 -- throughout 2018, which
11:56:36 6 resulted in both Microsoft and Sony opening up to enable
11:56:42 7 cross-play between their consoles and between every other
11:56:45 8 platform, with the effect that every *Fortnite* player on all
11:56:48 9 seven different platforms was able to play together in that
11:56:51 10 time frame.

11:56:52 11 **Q.** Are there any benefits to cross-play?

11:56:55 12 **A.** Yes. In a social game like *Fortnite*, players typically
11:56:59 13 played together with other friends in a duo or a squad. And
11:57:05 14 they are often playing socially or with voice chat. So the
11:57:11 15 magic of *Fortnite* is the ability to play together with people
11:57:15 16 you know in the real world and have a shared social
11:57:19 17 experience, even if you are in different places and on
11:57:21 18 different devices.

11:57:22 19 And this sort of social app only works well for players if
11:57:26 20 they can connect to all of their friends who want to play the
11:57:30 21 game. If players are segregated by their device so that Xbox
11:57:36 22 players could only play with Xbox players and so on, then it
11:57:40 23 would break up real-world social groups and impede people's
11:57:45 24 ability to play together with their colleagues.

11:57:47 25 **Q.** Does *Fortnite* support cross-progression?

11:57:51 1 A. Yes.

11:57:51 2 Q. What does "cross-progression" mean?

11:57:55 3 A. Cross-progression refers to people who have -- a user who
11:57:59 4 owns multi devices to connect with *Fortnite* on different -- on
11:58:05 5 these different platforms, and to have the same progression or
11:58:10 6 state or ownership of virtual items on all different
11:58:14 7 platforms; meaning that if you go into *Fortnite* on iOS, for
11:58:19 8 a time *Fortnite* outfits you owned on iOS and *Fortnite* record
11:58:24 9 of progress you had, would be carried over if you left iOS
11:58:29 10 and went over to Xbox, or if you left Xbox and came back to
11:58:35 11 iOS.

11:58:35 12 So throughout the day you can go between these different
11:58:37 13 devices in *Fortnite*, without ever losing your place.

11:58:41 14 Q. Does Epic charge for access to *Fortnite*?

11:58:46 15 A. No. *Fortnite* is free. Users on all platforms can
11:58:51 16 download the game and play without paying any money.

11:58:55 17 Q. How does Epic monetize *Fortnite*, if it does?

11:59:03 18 A. Epic sells cosmetics within the game in which players can
11:59:07 19 optionally purchase to enhance their appearance in the world
11:59:11 20 of *Fortnite*.

11:59:12 21 Q. Can you define what the word "cosmetic" means in
11:59:14 22 connection with the world of *Fortnite*?

11:59:17 23 A. A cosmetic item is an item that changes your avatar's
11:59:23 24 appearance in the world, such as an outfit. You can either
11:59:26 25 appear in *Fortnite* as a Marvel superhero or a giant banana.

11:59:32 1 *Fortnite* cosmetics also includes emotes such as dances, or
11:59:37 2 gestures that you can make on your animated character in the
11:59:43 3 world and other, let's say, fashion accessories.

11:59:47 4 **Q.** You've mentioned the word "avatar." What does the word
11:59:51 5 "avatar" mean?

11:59:53 6 **A.** Avatar refers to your -- the 3D character who is
11:59:57 7 representing you in the real-time three-dimensional world of
12:00:02 8 *Fortnite*.

12:00:03 9 **Q.** Now, have you heard of the phrase "in-app purchase?"

12:00:06 10 **A.** Yes.

12:00:07 11 **Q.** What does that mean?

12:00:12 12 **A.** In-app purchase refers to the capability of a user to
12:00:15 13 spend money within an app without having to leave the app and
12:00:19 14 go to another place in order to get typically a benefit of
12:00:23 15 some sort within the app.

12:00:25 16 **Q.** And some of these items that you've mentioned, for
12:00:29 17 instance cosmetics, does Epic offer cosmetics as in-app
12:00:34 18 purchases?

12:00:35 19 **A.** Yes. Epic sells many outfits through in-app purchase.

12:00:40 20 **Q.** Can -- is there any reason why Epic decided to -- or chose
12:00:45 21 to offer in-app purchases?

12:00:49 22 **A.** Yes. We wanted to make our game as widely accessible as
12:00:56 23 possible, so that economics wouldn't limit somebody's access
12:01:01 24 to *Fortnite*. And to build a business around that, we offered
12:01:05 25 the optional ability for people to purchase these outfits and

12:01:10 1 to improve their appearance, in an entirely optional and
12:01:15 2 nonmandatory way.

12:01:17 3 **Q.** Do any of the in-app purchases that are offered to users
12:01:22 4 impact game play?

12:01:24 5 **A.** No. One of the key principles of *Fortnite Battle Royale*
12:01:30 6 is you can never gain an advantage over another human by
12:01:35 7 purchasing any sort of item in the game. All players
12:01:39 8 participate on a level-playing field, and the money they spend
12:01:43 9 only determines how they appear or what dances they can do,
12:01:46 10 not how fast they can run. You can't spend money to go
12:01:52 11 faster, to jump higher, to shoot more accurately, for example.

12:01:59 12 **Q.** All right. And have you heard the phrase "out-of-app
12:02:01 13 purchases"?

12:02:01 14 **A.** Yes.

12:02:03 15 **Q.** Can you compare in-app purchases to out-of-app purchases
12:02:05 16 in so far as your experience with them relates to *Fortnite*?

12:02:12 17 **A.** In-app purchases are far more convenient than out-of-app
12:02:16 18 purchases. Users in *Fortnite*, and they see an interesting
12:02:26 19 cosmetic item available, in-app purchase makes it possible for
12:02:32 20 them to buy it immediately with just a few taps on their
12:02:36 21 screen; whereas out-of-app purchase would require the player
12:02:41 22 to leave *Fortnite*, perhaps open a web browser, navigate to a
12:02:46 23 web page, and separately make a purchase there. Perhaps have
12:02:52 24 to log in separately as well.

12:02:54 25 So out-of-app purchase has far more friction than in-app

12:03:01 1 purchase.

12:03:02 2 Q. We spoke a few moments ago about *Fortnite* usage in 2020.

12:03:07 3 Was this lawsuit in any way related to any trend in *Fortnite*

12:03:12 4 usage in 2020?

12:03:15 5 A. No. The lawsuit is entirely about Apple's practices.

12:03:20 6 Q. Was there a time when *Fortnite* was available through

12:03:23 7 Apple's App Store?

12:03:24 8 A. Yes.

12:03:25 9 Q. When was *Fortnite* first made available in the App Store?

12:03:30 10 A. We launched a beta version of *Fortnite* I believe in March

12:03:35 11 of 2018. Soon updated it to a full release in I believe

12:03:45 12 April 2018.

12:03:46 13 Q. Why did Epic launch *Fortnite* on iOS?

12:03:51 14 A. After we launched *Fortnite* on PC, Xbox, and PlayStation,

12:03:57 15 we very quickly realized that *Fortnite* was transcending

12:04:02 16 gaming, that people were often playing with their friends in a

12:04:06 17 social way. It was atypical for traditional games.

12:04:11 18 And we also found many people were bringing their friends

12:04:15 19 in to play *Fortnite*, even if their friends were not

12:04:20 20 traditional gamers. And we realized it would be incredibly

12:04:22 21 valuable to open up *Fortnite* to a much wider audience than the

12:04:27 22 PC or console audience that we had so far reached.

12:04:32 23 Smartphones, both iOS and Android, reached a far larger

12:04:36 24 audience than consoles, and so we really wanted to enable

12:04:42 25 *Fortnite* players to be able to play with all of their friends

12:04:45 1 across all devices that they might own.

12:04:50 2 Q. Does iOS have any importance to Epic?

12:04:54 3 A. Yes. iOS is a vital platform for a business.

12:04:58 4 Q. And does iOS have an importance for the future of Epic's
12:05:03 5 business?

12:05:03 6 A. Yes.

12:05:05 7 Q. Can you describe that?

12:05:07 8 A. Well, our aim with *Fortnite* is to build something like a
12:05:11 9 metaverse from science fiction, and so far we have reached
12:05:16 10 around 400,000 -- sorry, 400 million participants. And we
12:05:22 11 have largely saturated the available audience of console
12:05:26 12 gamers and PC gamers; whereas there is a far larger audience
12:05:31 13 of smartphone developers -- sorry, smartphone users. And
12:05:37 14 reaching the entire base of Apple is 1 billion iPhone
12:05:42 15 consumers is a paramount goal for our company, as *Fortnite*
12:05:47 16 expands beyond being a game into this larger world of the
12:05:53 17 metaverse.

12:05:54 18 Q. Let's circle now back to some background about Epic. How
12:05:57 19 did Epic Games come into existence? Can you describe its
12:06:02 20 origin story?

12:06:03 21 A. I started a company in 1991 initially called Potomac
12:06:08 22 Computer Systems, after my hometown. And then at that time I
12:06:15 23 released my first game. And in 1992 I released my second game
12:06:20 24 called *Jill of the Jungle* and updated the company's name to
12:06:26 25 Epic MegaGames.

12:06:28 1 Q. And where is Epic's principal place of business?

12:06:32 2 A. Epic is now located in Cary, North Carolina.

12:06:38 3 Q. Where is Epic incorporated?

12:06:39 4 A. Epic is still incorporated in Maryland.

12:06:41 5 Q. Does Epic have offices other than in Cary, North Carolina?

12:06:45 6 A. Yes. Epic has offices all around the United States and

12:06:48 7 around the world.

12:06:49 8 Q. Can you describe some of the places around the world where

12:06:52 9 Epic has offices?

12:06:54 10 A. Certainly. We are in Canada. We are in France, Germany,

12:06:59 11 Sweden, Finland. We have an Asian presence in Korea, Japan,

12:07:04 12 and China.

12:07:06 13 Q. How many people approximately does Epic employee today?

12:07:10 14 A. Epic employs just over 3200 people now.

12:07:14 15 Q. In 2020 what were Epic's approximate annual revenues?

12:07:17 16 A. Epic made approximately \$5.1 billion in gross revenues in

12:07:24 17 gross.

12:07:25 18 Q. And what did Epic do or what does Epic do with the

12:07:28 19 revenues it earns?

12:07:30 20 A. Epic very heavily reinvests in the future growth of our

12:07:36 21 business, through hiring and through funding business

12:07:40 22 initiatives of various sorts.

12:07:43 23 Q. Does Epic employ any engineers?

12:07:46 24 A. Yes, Epic employs roughly 900 engineers around the world.

12:07:51 25 Q. As the CEO of Epic, do you receive reports on Epic's

12:07:56 1 business from time to time?

12:07:57 2 **A.** Yes.

12:07:58 3 **Q.** And can you describe what some of those reports are?

12:08:06 4 **A.** Certainly.

12:08:06 5 I receive status reports, which are widely circulated
12:08:09 6 around the company, from all the major initiatives that are
12:08:12 7 under way, and I and the Epic board of directors receives
12:08:17 8 regular financial reports on the state of our business.

12:08:21 9 **MS. FORREST:** All right. And I would like to hand
12:08:23 10 the witness -- if I may I approach, Your Honor?

12:08:26 11 **THE COURT:** You may.

12:08:26 12 **MS. FORREST:** -- PX2455. I will hand it to counsel
12:08:30 13 as well.

12:08:30 14 Mr. Doren, let me give you a copy of that binder.

12:08:33 15 PX255 (sic), PX2456 -- did I say 255? 2455 was the first
12:08:41 16 one.

12:08:41 17 PX2456, PX2463, and we'll stop there.

12:08:53 18 **BY MS. FORREST:**

12:08:53 19 **Q.** Let me ask you, Mr. Sweeney, first to take a look at those
12:09:05 20 three documents.

12:09:16 21 **MS. FORREST:** Your Honor, I have a binder that I
12:09:18 22 could hand the Court if it is easier, or if you got the --

12:09:21 23 **THE COURT:** We pulled them this morning.

12:09:23 24 **MS. FORREST:** Thank you.

12:09:26 25 **THE WITNESS:** Okay.

12:09:26 1 **BY MS. FORREST:**

12:09:27 2 **Q.** All right. Mr. Sweeney, do you first recognize what has
12:09:30 3 been marked for identification as PX2455?

12:09:34 4 **A.** Yes.

12:09:34 5 **Q.** What is it?

12:09:35 6 **A.** This is a financial report and summary form from Epic CFO
12:09:41 7 Randy Gelber to Epic's board of directors.

12:09:43 8 **Q.** Is it something that you received?

12:09:44 9 **A.** Yes.

12:09:45 10 **Q.** Did you receive it in connection with your duties and
12:09:47 11 responsibilities at Epic?

12:09:49 12 **A.** Yes.

12:09:50 13 **Q.** Let's turn if we can -- and I'll offer --

12:09:53 14 **MS. FORREST:** Well, let me offer right now. Your
12:09:54 15 Honor, I would like to offer PX2455 into evidence.

12:09:58 16 **THE COURT:** Any objection?

12:09:59 17 **MR. DOREN:** No objection.

12:10:00 18 **THE COURT:** So this whole set, is there an objection?

12:10:04 19 **MR. DOREN:** No, Your Honor.

12:10:04 20 **THE COURT:** All right. So 2455, -56, and -63 are
12:10:09 21 admitted.

12:10:09 22 **MS. FORREST:** All right. Thank you.

12:10:10 23 (Plaintiff's Exhibits 2455, 2456, 2463 received in evidence)

12:10:11 24 **BY MS. FORREST:**

12:10:12 25 **Q.** You can put those to the side, Mr. Sweeney.

12:10:19 1 Mr. Sweeney, I would like to talk now about some of the
12:10:24 2 Epic lines of business that we discussed earlier. Can you
12:10:28 3 describe some of the apps that Epic developed? You mentioned
12:10:34 4 a few, but can you describe them and speak slowly and clearly?
12:10:38 5 Some of the names may be unusual.

12:10:43 6 **A.** Yes. Our biggest app right now is *Fortnite*, a social
12:10:50 7 entertainment experience.

12:10:53 8 We -- we have several games that we're actively
12:10:59 9 developing, including *Rocket League*, a game about cars playing
12:11:06 10 soccer; and *Fall Guys*, which is a virtual 3D game show; and we
12:11:13 11 make *Houseparty*, which is a social video application, sort of
12:11:20 12 like a version of Zoom that's for groups of friends.

12:11:25 13 **Q.** Is *Houseparty* a gaming app?

12:11:28 14 **A.** No.

12:11:33 15 **Q.** Have you heard of something called the *Unreal Engine*?

12:11:35 16 **A.** Yes.

12:11:36 17 **Q.** What is the *Unreal Engine*?

12:11:38 18 **A.** The *Unreal Engine* is a development tool aimed at 3D
12:11:43 19 content creators rather than consumers. It contains content
12:11:47 20 creation tools, real-time 3D graphics, capabilities, and
12:11:56 21 real-time physics and simulation technology that is used by a
12:12:02 22 wide variety of industries to make a variety of 3D content.

12:12:07 23 **Q.** Is the *Unreal Engine* a gaming app?

12:12:10 24 **A.** No.

12:12:11 25 **Q.** Is it an app?

12:12:12 1 A. Yes.

12:12:13 2 Q. Is the *Unreal Engine* distributed on iOS?

12:12:17 3 A. The *Unreal Engine*, the development tool is -- includes
12:12:22 4 facets that are distributed on iOS.

12:12:25 5 Q. For how long have facets of the *Unreal Engine* been
12:12:28 6 distributed on iOS?

12:12:30 7 A. I believe for at least two years.

12:12:32 8 Q. *Houseparty*, is *Houseparty* distributed on iOS?

12:12:36 9 A. Yes.

12:12:36 10 Q. For approximately how long has *Houseparty* been distributed
12:12:39 11 on iOS?

12:12:42 12 A. I believe for at least two years.

12:12:47 13 THE COURT: You said for two years?

12:12:48 14 THE WITNESS: Yes.

12:12:51 15 BY MS. FORREST:

12:12:52 16 Q. Is *Houseparty* available on any other platforms?

12:12:56 17 A. Yes. *Houseparty* is also available on Android, Windows,
12:13:01 18 and Mac.

12:13:03 19 Q. Is the *Unreal Engine* available on any other platforms,
12:13:06 20 apart from iOS?

12:13:11 21 A. *Unreal Engine* supports the creation of apps, which can run
12:13:18 22 on at least eight different platforms.

12:13:20 23 Q. All right. And are there apps that are made using the
12:13:23 24 *Unreal Engine* that are distributed on iOS?

12:13:27 25 A. Yes.

12:13:29 1 Q. Does Epic make software, other tool software other than
12:13:34 2 the *Unreal Engine*?

12:13:36 3 A. Yes. We also make an online software development kit
12:13:40 4 called Epic Online Services.

12:13:43 5 Q. Does the Epic Online Services go by any acronym?

12:13:47 6 A. Yes. We call it EOS.

12:13:49 7 Q. And before we actually leave the *Unreal Engine*, can you
12:13:53 8 describe for us approximately how many developers use the
12:13:57 9 *Unreal Engine*?

12:13:59 10 A. We've had more than 7 million users install the software
12:14:03 11 over a lifetime, and we have roughly 500,000 monthly active
12:14:09 12 users.

12:14:09 13 Q. And can you describe some of the software that has been
12:14:14 14 created with the *Unreal Engine*?

12:14:17 15 A. Certainly.

12:14:17 16 The list includes games such as *PlayerUnknown's*
12:14:24 17 *Battlegrounds*, *Rocket League*, literally thousands of other
12:14:33 18 games. It also includes architectural creation apps built by
12:14:41 19 third parties. It includes video production apps used in
12:14:46 20 television production. And it includes a virtual production
12:14:53 21 software that is used in the production of films and
12:14:56 22 television, as in Disney Plus' *The Mandalorian* series.

12:15:03 23 Q. Are there apps that are created by third parties using the
12:15:06 24 *Unreal Engine*?

12:15:07 25 A. Yes.

12:15:08 1 Q. Are those apps distributed on any platforms?

12:15:12 2 A. Yes. To my knowledge we've had apps distributed by third
12:15:18 3 parties on at least Windows and Mac.

12:15:22 4 Q. And does Epic earn revenue from the *Unreal Engine*?

12:15:27 5 A. Yes.

12:15:28 6 Q. Can you describe how Epic earns revenue from the *Unreal*
12:15:32 7 *Engine*?

12:15:33 8 A. Certainly.

12:15:34 9 We have a business model that enables anybody to download
12:15:39 10 and begin using the *Unreal Engine* for free. And then we have
12:15:45 11 a variety of business terms under which users may distribute
12:15:50 12 commercial products using the *Unreal Engine*.

12:15:55 13 Q. And are you familiar with an app called PUBG?

12:16:00 14 A. Yes.

12:16:00 15 Q. What is PUBG?

12:16:00 16 A. PUBG is a game for consumers, consoles, and mobile devices
12:16:07 17 without using the *Unreal Engine*.

12:16:08 18 Q. Is PUBG distributed on iOS?

12:16:12 19 A. Yes.

12:16:13 20 Q. Are you familiar with something called Perfect Swing Golf?

12:16:15 21 A. Yes.

12:16:16 22 Q. And what is that?

12:16:18 23 A. That's an iOS app using the *Unreal Engine*.

12:16:23 24 Q. How many users use apps built with the *Unreal Engine*, if
12:16:28 25 you can estimate?

12:16:30 1 A. At least hundreds of millions.

12:16:32 2 Q. Does Epic charge anything for the initial download to a

12:16:37 3 developer on *Unreal Engine*?

12:16:42 4 A. No, the initial download is free.

12:16:44 5 Q. Let's talk for a moment again about Epic Online Services.

12:16:50 6 What is Epic Online Services?

12:16:53 7 A. Epic Online Services is a software development kit that we

12:16:58 8 make available to other game developers that provides many of

12:17:02 9 the social features that we built for *Fortnite* and makes them

12:17:08 10 available to other companies, such as Epic's account system,

12:17:14 11 Epic's matchmaking system, to put players together into a

12:17:20 12 shared game session. It includes Epic's friends system. And

12:17:27 13 we're soon to release the Epic Games voice system for voice

12:17:35 14 chat.

12:17:35 15 Q. And you mentioned the phrase "software development kit" in

12:17:38 16 connection with that answer. Is there an acronym by which

12:17:41 17 that word is known?

12:17:41 18 A. Yes. SDK.

12:17:46 19 Q. What platforms do the EOS SDKs support?

12:17:52 20 A. They support iOS, Android, Windows, Mac, Linux, Xbox,

12:17:58 21 PlayStation, and Nintendo Switch.

12:18:03 22 Q. Can the EOS SDK be used in apps that don't use the *Unreal*

12:18:08 23 *Engine*?

12:18:10 24 A. Yes.

12:18:11 25 Q. What other engines could it use?

12:18:14 1 **A.** Well, it is available on the variety of programming
12:18:18 2 languages and can be used in the Unity engine, the open source
12:18:23 3 Godot engine, or in-house engines used -- created by
12:18:30 4 developers.

12:18:31 5 **Q.** Does Epic charge developers for the initial download of
12:18:36 6 EOS?

12:18:37 7 **A.** No.

12:18:37 8 **Q.** Does Epic charge developers for the access to EOS at all?

12:18:41 9 **A.** No.

12:18:41 10 **Q.** Why does Epic make EOS available to developers?

12:18:48 11 **A.** Epic's benefit in making this SDK available is the growth
12:18:53 12 of our social ecosystem. Games that use the EOS friend system
12:18:58 13 have access to all of the friend connections, over 2 billion
12:19:02 14 connections, that players made in *Fortnite*, and they can
12:19:05 15 access those in other games. And when players add new social
12:19:09 16 connections in third-party games, and Epic benefits by the
12:19:12 17 larger social graph. It means more players can connect
12:19:16 18 together with their friends using our multiplatform services.

12:19:23 19 **Q.** You mentioned earlier that Epic distributes apps through
12:19:25 20 the Epic Games Store. Is the Epic Games Store sometimes known
12:19:29 21 as EGS?

12:19:31 22 **A.** Yes.

12:19:31 23 **Q.** And on what platforms is EGS currently available?

12:19:35 24 **A.** The Epic Games Store is available for Windows and Mac
12:19:42 25 computers.

12:19:43 1 Q. Can you describe for the Court the process by which a user
12:19:46 2 would be able to obtain an app from the EGS from the Epic
12:19:51 3 Games Store on to a Mac computer?

12:19:55 4 A. Certainly.

12:19:56 5 If you have not installed the Epic Games Store, the first
12:20:01 6 step is go to Epic's website, epicgames.com. There is a
12:20:08 7 download button that says Get Epic Games. A user clicks that,
12:20:13 8 and then installs the Epic Games Store directly onto their
12:20:17 9 Mac, to our website. And then they can, from the store, and
12:20:22 10 either purchase games or obtain free games through the Epic
12:20:27 11 Games Store and our user interface.

12:20:30 12 Q. Are you aware of whether or not there have, in fact, been
12:20:32 13 instances in which the Epic Games Store has been downloaded
12:20:36 14 onto Macs?

12:20:37 15 A. Yes.

12:20:38 16 Q. And are you aware of any security issues that the Epic
12:20:41 17 Games Store has introduced on to any Mac devices on to which
12:20:45 18 it has been downloaded?

12:20:47 19 A. No, I am not.

12:20:48 20 Q. Can you tell us a little bit about the history of the Epic
12:20:50 21 Games Store?

12:20:52 22 A. Certainly.

12:20:52 23 We began creating the precursor to --

12:20:57 24 THE COURT: You began creating the?

12:20:58 25 THE WITNESS: The precursor to the Epic Games Store

1 in 2012 as a vehicle for distributing Epic's own products to
2 our customers. At this point it was called the Epic Games
3 Launcher.

4 The first product to be launched was not a game, it was
5 the *Unreal Engine* in 2014. We distributed it directly to
6 consumers through this app. Over time we released several
7 other Epic products and to the Epic Games Launcher, our intent
8 all along was to make it available as a store for hosting
9 games from other developers.

10 We launched the Epic Games Store as a storefront for
11 mothball (phonetic) publisher's games in late 2018, and over
12 that -- since then we have been adding features and expanding
13 the capability of the store.

14 **BY MS. FORREST:**

15 **Q.** At the time that Epic launched the Epic Games Store, did
16 it have plans to include different types of apps?

17 **A.** Yes. That was my intention.

18 **Q.** Can you describe some of the different types of apps that
19 Epic planned to include in the store when it was first
20 launched?

21 **A.** Our aspiration was to become a general distribution
22 vehicle for any type of software. We were initially thinking
23 about distributing tools from third-party developers because
24 we had a large audience for the *Unreal Engine* tool. Our
25 intent was to be a broad-based distribution vehicle for any

12:22:37 1 kind of software for the devices we supported.

12:22:40 2 Q. And today does the Epic Games Store distribute games?

12:22:45 3 A. Yes.

12:22:46 4 Q. And today does the Epic Games distribute any nongames?

12:22:51 5 A. Yes.

12:22:53 6 Q. Does -- are you familiar with the app Spotify?

12:22:56 7 A. Yes.

12:22:56 8 Q. What is the app Spotify?

12:22:58 9 THE COURT: I take it you are making a distinction
12:22:59 10 between today and when the lawsuit was filed; right?

12:23:03 11 MS. FORREST: Let me clean that up, Your Honor.

12:23:05 12 Thank you for that.

12:23:08 13 THE COURT: Yes.

12:23:09 14 BY MS. FORREST:

12:23:09 15 Q. All right. Mr. Sweeney, in August of 2020, did the Epic
12:23:16 16 Games Store host any nongame apps?

12:23:20 17 A. Yes. Since its inception, the Epic Games Store has hosted
12:23:26 18 the *Unreal Engine*.

12:23:28 19 THE COURT: Anything beyond that?

12:23:31 20 THE WITNESS: No, not until about four months ago.

12:23:38 21 BY MS. FORREST:

12:23:39 22 Q. When did Spotify first go on to the Epic Games Store?

12:23:44 23 A. I am sorry, I don't remember the date. I believe it was
12:23:49 24 three or four months ago. I apologize.

12:23:53 25 Q. All right. Are there any other nongame apps currently

distributed through the Epic Games Store?

A. Yes. There are several.

Q. Can you name them and the type of app they are, for the Court?

A. Certainly.

There's the Brave web browser. There's KenShape, a creation tool for artists. There is Itch, I-T-C-H, dot IO, a third party store hosted by our store.

Q. Does the Epic Games Store charge developers a commission for the apps that it distributes?

A. Epic charges a commission to developers who use our payment method, which we provide them as an option.

Q. If a developer does not use the payment method that EGS provides, does Epic charge a commission in any other way?

A. Epic charges no commission when developers use their own payment method for in-app purchases. I should note that the only way to distribute a paid game in the Epic Games Store currently is with the initial paid transaction occurring using Epic's payment method.

Q. All right. So there are two different types of commissions; is that right, through the Epic Games Store?

A. Well, there's a commission on the initial sales of an app if it's not free, if -- which is mandatory. And then there is a commission on in-app purchases, which is only charged when a developer uses our payment processing method.

12:25:34 1 Q. How did Epic -- what is the commission rate that is
12:25:38 2 charged by the Epic Games Store for the initial purchase of an
12:25:42 3 app?

12:25:43 4 A. It's 12 percent of gross revenue.

12:25:46 5 Q. And how much is the commission rate for -- that Epic
12:25:49 6 charges for an in-app purchase?

12:25:51 7 A. 12 percent when our payment processing is used.

12:25:54 8 Q. And what does the 12 percent cover?

12:25:58 9 A. 12 percent is intended to cover all Epic's variable
12:26:03 10 operating costs. The cost of processing an additional
12:26:07 11 transaction.

12:26:09 12 Q. And does Epic make a profit with its 12 percent
12:26:15 13 commission? And let's focus on in-app purchases.

12:26:19 14 A. Epic makes a gross profit on the variable cost associated
12:26:23 15 with a new purchase. We make more money from the 12 percent
12:26:27 16 than it typically costs us to cover the cost of that
12:26:30 17 additional purchase, but that does not account for all of the
12:26:36 18 storage costs, such as marketing and exclusive products.

12:26:39 19 Q. Is the Epic Games Store currently profitable?

12:26:43 20 A. No. When you consider all of the costs of the Epic Games
12:26:46 21 Store, it's hundreds of millions of dollars short of being
12:26:52 22 profitable because of the upfront investments we've made in
12:26:57 23 the store.

12:26:58 24 Q. And is that also true also in August of 2020, was the Epic
12:27:02 25 Games Store profitable at that time?

12:27:03 1 A. It was not profitable then.

12:27:05 2 Q. Is there any projection that you have as to when the Epic

12:27:10 3 Games Store will achieve profitability?

12:27:14 4 A. I don't have detailed financial projections for long-term,

12:27:16 5 but we have a general expectation of becoming profitable

12:27:20 6 within three or four years, apparently.

12:27:22 7 Q. Is the Epic Games Store currently available on iOS?

12:27:27 8 A. No.

12:27:28 9 Q. Why not?

12:27:30 10 A. Apple does not allow third parties to distribute stores

12:27:34 11 for iOS.

12:27:37 12 Q. You mentioned a moment ago that Epic has a payment

12:27:42 13 processing system. Is there a name for that?

12:27:46 14 A. We are nowadays calling it Epic Direct Payment.

12:27:51 15 Q. All right. Where is Epic Direct Payment used?

12:27:56 16 A. It's used as the default payment method in the Epic Games

12:28:00 17 Store for Windows and Mac, and it is the payment service that

12:28:05 18 we enter when we launched *Fortnite* on iOS -- I'm sorry,

12:28:08 19 *Fortnite* -- when we launched *Fortnite's* direct payment service

12:28:11 20 on iOS.

12:28:15 21 Q. And for third-party developers whose apps are distributed

12:28:18 22 through the Epic Games Store, do they have to use the Epic

12:28:22 23 Direct Payment system?

12:28:24 24 A. No, they are not required to.

12:28:25 25 Q. Prior to August 2020, had the Epic Direct Payment system

12:28:32 1 processed any transactions on any platform?

12:28:36 2 **A.** Yes.

12:28:37 3 **Q.** Prior to August of 2020 approximately what was the volume
12:28:42 4 of transactions that the Epic Direct Payment system had
12:28:46 5 processed?

12:28:48 6 **A.** Between *Fortnite* on open platforms and the Epic Games
12:28:51 7 Store, we had processed over a billion dollars of financial
12:28:55 8 transactions.

12:28:56 9 **Q.** And are you aware of any security issues introduced on to
12:29:00 10 any devices as a result of the use of the Epic Direct Payment
12:29:05 11 system?

12:29:05 12 **A.** No.

12:29:07 13 **Q.** Does Epic have any plans for Epic Direct Payment on iOS?

12:29:15 14 **A.** Yes. So Epic introduced Epic Direct Payment into *Fortnite*
12:29:20 15 on iOS. And it is a general service that we would like to
12:29:23 16 make available to other developers in the future if we were
12:29:26 17 allowed to.

12:29:27 18 **Q.** Are there any benefits that Epic believes it derives from
12:29:32 19 the use of the Epic Direct Payment system?

12:29:36 20 **A.** Yes.

12:29:38 21 **Q.** And can you describe those for us?

12:29:40 22 **A.** When a customer contacts us for support, if we process
12:29:44 23 that customer's payment directly, we have far more knowledge
12:29:48 24 about the details of the payment and far more control over
12:29:52 25 issuing refunds or partial refunds or investigating anything

12:29:56 1 that went wrong because we have that direct access to our
12:30:01 2 payment service; whereas with Apple's In-App Purchase system,
12:30:06 3 we have no way to help a customer if we need to refund them.
12:30:09 4 We simply have to tell them to go talk to Apple.

12:30:14 5 **Q.** Now, let's turn to where Epic does business. Where does
12:30:19 6 Epic do business geographically?

12:30:22 7 **A.** We do business in most of the world.

12:30:25 8 **Q.** Let's take some of the business lines one by one. Where
12:30:29 9 geographically is the Epic Games Store available?

12:30:33 10 **A.** It is available for download from any place that connects
12:30:38 11 to our website, and customers are allowed to create accounts
12:30:43 12 for it in any territory that isn't subject to U.S. export
12:30:47 13 restrictions.

12:30:48 14 **Q.** And where are the apps that Epic develops available
12:30:51 15 geographically?

12:30:53 16 **A.** Everywhere the Epic Games Store is available.

12:30:56 17 **Q.** And is that true with regard to *Fortnite*?

12:31:00 18 **A.** Yes. With the exception of China, which -- where we are
12:31:08 19 not operating at a version of *Fortnite* that is publicly
12:31:12 20 available.

12:31:13 21 **Q.** And we've talked about the *Unreal Engine*. Where is the
12:31:16 22 *Unreal Engine* available geographically?

12:31:21 23 **A.** The *Unreal Engine* is available everywhere in the world
12:31:25 24 that is not subject to certain U.S. export restrictions.

12:31:28 25 **Q.** And how about the SDK that is referred to as the EOS, the

12:31:36 1 Epic Online Services, where is that available geographically?

12:31:41 2 **A.** It is the same. It is the same.

12:31:45 3 **Q.** How about Epic Direct Payment, where does Epic Direct

12:31:49 4 Payment process transactions geographically?

12:31:55 5 **A.** We process transactions either directly or through a
12:31:59 6 payment processing partner in at least a hundred different
12:32:05 7 countries.

12:32:05 8 **Q.** All right. Let's turn to a different topic.

12:32:08 9 Do you own --

12:32:09 10 **THE COURT:** We're going to take a break here in three
12:32:14 11 minutes. So is now a good time?

12:32:16 12 **MS. FORREST:** Now would be a good time, Your Honor.

12:32:17 13 **THE COURT:** We will stand in recess until 1:15.

12:32:28 14 (Recess taken at 12:32 P.M.; resumed at 1:14 p.m.)

01:14:23 15 **THE COURT:** Okay.

01:14:26 16 **THE CLERK:** Remain seated. Court is in session.
01:14:30 17 Come to order.

01:14:32 18 **THE COURT:** All right. We are back on the record.
01:14:34 19 The record will reflect the parties are present. Mr. Sweeney,
01:14:39 20 is on the stand.

01:14:40 21 You may proceed.

01:14:44 22 **MS. FORREST:** Thank you, Your Honor.

01:14:45 23 **BY MS. FORREST:**

01:14:45 24 **Q.** Mr. Sweeney, does Epic make any apps for smartphones?

01:14:54 25 **A.** Yes.

01:14:55 1 Q. What is a smartphone?

01:14:57 2 A. A smartphone is a -- well, to me it's a portable
01:15:02 3 supercomputer and it has the ability of a cell phone that has
01:15:07 4 a high-resolution screen, touch input, and internet
01:15:14 5 connectivity that is connected to a cellular network.

01:15:20 6 Q. Are you familiar with the term "feature phone"?

01:15:22 7 A. Yes.

01:15:23 8 Q. What is a feature phone?

01:15:25 9 A. A feature phone is something like a cell phone back from
01:15:27 10 in the Nokia days, a device for making phone calls and sending
01:15:34 11 and receiving text messages, but generally lacks the ability
01:15:38 12 to run sophisticated apps.

01:15:41 13 Q. All right. And does Epic make any apps for feature
01:15:46 14 phones?

01:15:46 15 A. No.

01:15:47 16 Q. Why not?

01:15:48 17 A. Feature phones don't have nearly the performance or
01:15:52 18 features required to run a modern app for an entertainment
01:15:57 19 experience like *Fortnite*.

01:15:59 20 Q. Let's talk about the word "native app." Are you familiar
01:16:01 21 with that phrase?

01:16:02 22 A. Yes.

01:16:03 23 Q. What is that? What is a native app?

01:16:06 24 A. A native app is a program that is able to run directly on
01:16:11 25 the hardware of a device and has a full access to the CPU --

01:16:19 1 the device's processor and graphics capabilities to the extent
01:16:23 2 the operating system exposes them, and it runs at full
01:16:28 3 performance on the device.

01:16:29 4 **Q.** And you've used the phrase "operating system." What is an
01:16:32 5 operating system?

01:16:33 6 **A.** An operating system is a piece of software that runs, at
01:16:38 7 the highest level, security on the device and maintains the
01:16:44 8 isolation of applications running on the devices and supports
01:16:49 9 them. The operating system ensures that apps can't access
01:16:52 10 data they are not allowed to access, and prevents apps from
01:16:56 11 interfering with each other.

01:16:58 12 **Q.** And can you name some types of operating systems?

01:17:02 13 **A.** There are computer operating systems like Apple's macOS
01:17:08 14 and Microsoft Windows, and there are smartphone operating
01:17:11 15 systems like by iOS and Android and others.

01:17:15 16 **Q.** Does Nintendo for the Switch have an operating system?

01:17:20 17 **A.** Yes.

01:17:20 18 **Q.** And does it have a particular name?

01:17:23 19 **A.** Well, generally the console platforms use proprietary
01:17:28 20 operating systems or variations of an open source operating
01:17:34 21 system that are not given a brand name for themselves.

01:17:37 22 **Q.** So is that true also for Xbox? Does Xbox have an
01:17:40 23 operating system?

01:17:41 24 **A.** Yes.

01:17:42 25 **Q.** And it doesn't have a particular name?

01:17:47 1 **A.** I think it has various names referred to internally, but
01:17:52 2 it is not marketed as a brand.

01:17:54 3 **Q.** Is *Fortnite* available as a native app?

01:17:57 4 **A.** Yes.

01:17:57 5 **Q.** On what platforms is *Fortnite* available as a native app?

01:18:03 6 **A.** Currently Windows, Xbox, PlayStation, Nintendo Switch, and
01:18:17 7 Android.

01:18:18 8 **Q.** And prior to August 2020, was *Fortnite* available as a
01:18:23 9 native app on any other platforms in addition to the ones you
01:18:27 10 just mentioned?

01:18:29 11 **A.** Yes. It was also available on iOS and macOS.

01:18:33 12 **Q.** Why does Epic make *Fortnite* available on so many
01:18:38 13 platforms?

01:18:39 14 **A.** Because *Fortnite* is a social experience. The key to its
01:18:44 15 success and longevity is the ability for players to connect
01:18:48 16 with all of their friends, and so that requires supporting --
01:18:51 17 all -- not only the device that you might own as a gamer, but
01:18:55 18 all of the devices your friends might own in order to connect
01:19:00 19 to them.

01:19:00 20 **Q.** Let's talk about the iOS platform. What are the ways to
01:19:08 21 distribute a native app on the iOS platform?

01:19:12 22 **A.** The iOS App Store is the general way of distributing
01:19:19 23 apps to consumers. However, Apple makes a number of other
01:19:21 24 mechanisms available for limited purpose distribution. For
01:19:24 25 example, to enterprise employees or to testers working on a

01:19:31 1 software development environment.

01:19:33 2 **Q.** In your experience is the enterprise way of distributing
01:19:37 3 an iOS app open to consumers for native app distribution?

01:19:42 4 **A.** No. Apple forbids its Apple enterprise program mechanisms
01:19:48 5 of software installation on iOS from being used for consumer
01:19:53 6 app distribution.

01:19:54 7 **Q.** You also mentioned a test environment. Is that test
01:19:58 8 environment available for consumers for native app iOS
01:20:03 9 distribution?

01:20:06 10 **A.** It is not available for general distribution of app to
01:20:10 11 consumers. If a particular consumer were participating in a
01:20:14 12 small scale test, you might be able to access it that way.

01:20:18 13 **Q.** Are you familiar with the term "sideloading"?

01:20:21 14 **A.** Yes.

01:20:21 15 **Q.** What does that mean?

01:20:23 16 **A.** Sideloading refers to the ability to install software onto
01:20:27 17 a device from a source other than the platform's official
01:20:31 18 store.

01:20:34 19 **Q.** Does iOS allow sideloading generally for consumers?

01:20:39 20 **A.** iOS does not allow sideloading.

01:20:41 21 **Q.** Does the macOS environment allow for sideloading?

01:20:45 22 **A.** Yes.

01:20:47 23 **Q.** Let's talk about something called a web app. Are you
01:20:50 24 familiar with that term?

01:20:51 25 **A.** Yes.

01:20:52 1 Q. What is a web app?

01:20:54 2 A. A web app is an application written to run within a web
01:20:58 3 browser using the web browser as limited technologies for
01:21:03 4 display, such as HTML and its limited abilities for
01:21:09 5 programming such as JavaScript. A web app will generally run
01:21:16 6 within the web browser on different platforms.

01:21:19 7 Q. So how is a web app different from a native app?

01:21:23 8 A. A web app is limited to a set of APIs available within a
01:21:29 9 web browser, which are considerably more limited and thus
01:21:35 10 powerful than the capability available to native apps, and
01:21:40 11 they also have memory limitations and other constraints
01:21:45 12 applied to them within this web browser environment.

01:21:48 13 Q. Is *Fortnite* available as a web app?

01:21:51 14 A. No.

01:21:51 15 Q. Why not?

01:21:54 16 A. Web apps are not nearly powerful enough to run the modern
01:21:59 17 3D real-time experience such as *Fortnite*.

01:22:02 18 Q. Have you heard of the phrase "video game streaming"?

01:22:05 19 A. Yes.

01:22:05 20 Q. What does that phrase mean?

01:22:09 21 A. Game streaming refers to an emerging usage scenario where
01:22:14 22 a user will attempt to play a game on a device while the
01:22:20 23 software for the game is actually running on its server,
01:22:23 24 hosted somewhere else in the cloud. And instead of the
01:22:27 25 software running natively on the user's device, the user's

01:22:31 1 device essentially sends input over to the cloud server, the
01:22:35 2 cloud server runs the app and then streams video back to the
01:22:39 3 user's device so the user can see a view of what the app is
01:22:44 4 doing on the cloud server and be able to interact with this
01:22:52 5 cloud-hosted app in real-time.

01:22:56 6 **Q.** So in the streaming scenario, the app is running off of a
01:23:01 7 server, and in the native environment, it is running off of
01:23:03 8 the operating system directly?

01:23:07 9 **A.** Yes.

01:23:07 10 **Q.** And how does -- do you have any understanding as to
01:23:10 11 whether or not the user experience for *Fortnite* differs at all
01:23:15 12 when an app for *Fortnite* is being streamed versus run
01:23:19 13 natively?

01:23:20 14 **A.** Yes.

01:23:20 15 **Q.** Could you describe that to the Court please.

01:23:23 16 **A.** In the case of web streaming, the experience is very
01:23:28 17 highly dependent on the quality of the user's internet
01:23:32 18 connection, because rather than seeing your actions reflected
01:23:36 19 immediately on screen, you have to wait for your input to be
01:23:40 20 sent to the server and for the resulting video to be sent back
01:23:45 21 to you. So unless the user has a very high-quality internet
01:23:49 22 connection and is very close to a data center, the experience
01:23:52 23 is degraded, often significantly, both in the form of reduced
01:23:58 24 bandwidth, so lower graphical quality, and higher latency,
01:24:04 25 meaning more lag between when you try to aim in *Fortnite* and

01:24:09 1 when you actually see the resulting movement occur.

01:24:12 2 And then additionally there are often significant costs
01:24:17 3 associated with hosting the servers in the cloud instead of
01:24:23 4 running the application on the device, which the user has
01:24:27 5 already purchased. There is additional hardware involved that
01:24:29 6 has to be paid for somehow, and there is bandwidth that has to
01:24:33 7 be paid for.

01:24:34 8 **Q.** Is *Fortnite* currently available for streaming on iOS?

01:24:38 9 **A.** No.

01:24:38 10 **Q.** Does Epic have any plans to make *Fortnite* available for
01:24:43 11 streaming on iOS?

01:24:44 12 **A.** Yes. Epic is working with Nvidia and their GeForce,
01:24:50 13 G-E-F-O-R-C-E, Now service to experiment and privately test a
01:24:59 14 version of *Fortnite* which runs on Nvidia servers, but which
01:25:05 15 players can experience from an iOS device using the Safari
01:25:09 16 web browser.

01:25:11 17 **Q.** As you sit here today, do you have any view as to whether
01:25:14 18 or not that will provide a user experience comparable to the
01:25:19 19 use of *Fortnite* running as a native app?

01:25:24 20 **A.** In my experience using it, it has significantly higher
01:25:28 21 latency and lower graphical quality. For other users the
01:25:34 22 experience varies, and certainly there will be additional
01:25:36 23 costs for users in order to access the game in this way.

01:25:42 24 **Q.** Can you explain what you mean by additional costs for
01:25:45 25 users?

01:25:45 1 **A.** Yes. Well, with Nvidia's GeForce Now service, to be able
01:25:50 2 to play a game anytime you have to be a subscriber and pay a
01:25:56 3 fee for Nvidia. They have a free version of the service where
01:25:59 4 users can lineup and wait for a free server to become
01:26:04 5 available so they can play.

01:26:06 6 Now, these costs are cost associated with buying
01:26:09 7 additional hardware since the device is not running on the --
01:26:13 8 since the application is not running on the device the user
01:26:15 9 already owns. And the additional costs of bandwidth needed to
01:26:20 10 move the data back and forth. And the cost of bandwidth is,
01:26:23 11 to some extent, attributed to the data center that's using the
01:26:28 12 bandwidth. But also if the user is using a smartphone and a
01:26:32 13 wireless data plan, then there would be perhaps additional
01:26:38 14 charges for very high bandwidth usage.

01:26:41 15 **Q.** Are you familiar with something called a console?

01:26:44 16 **A.** Yes.

01:26:44 17 **Q.** What is a console?

01:26:48 18 **A.** A console is a fixed function device as typically plugged
01:26:52 19 into a television and controlled using a game controller or a
01:26:56 20 joystick. It's focused specifically on games and
01:27:02 21 entertainment experiences. Some of the consoles will stream
01:27:06 22 video through Netflix and other services.

01:27:09 23 **Q.** And what companies make consoles?

01:27:13 24 **A.** Microsoft makes Xbox. Sony makes PlayStation. And
01:27:18 25 Nintendo makes the Switch.

01:27:21 1 Q. And do you have familiarity with the Microsoft Xbox?

01:27:26 2 A. Yes.

01:27:27 3 Q. Do you have familiarity with the performance of the
01:27:30 4 Microsoft Xbox?

01:27:32 5 A. Yes.

01:27:33 6 Q. Do you have familiarity with the performance of the Sony
01:27:35 7 PlayStation?

01:27:36 8 A. Yes.

01:27:37 9 Q. And do you have familiarity with the Nintendo Switch
01:27:40 10 performance?

01:27:41 11 A. Yes.

01:27:41 12 Q. All right. Is *Fortnite* available on each of the devices,
01:27:45 13 Xbox, PlayStation, and Switch?

01:27:49 14 A. Yes.

01:27:50 15 Q. Are there any differences that you're aware of in the
01:27:54 16 performance of *Fortnite* on a console versus on a smartphone?

01:28:00 17 A. Yes. The performance of *Fortnite* and Nintendo Switch is
01:28:04 18 similar to many smartphones. The performance of *Fortnite* on
01:28:08 19 Xbox and PlayStation is typically much higher. You have a
01:28:14 20 higher graphics fidelity. You have certain graphical features
01:28:18 21 which are available only on high-end consoles and PCs, such as
01:28:25 22 advanced shadows and reflections that make the 3D world of
01:28:29 23 *Fortnite* more realistic.

01:28:32 24 Q. Are you familiar with the power source for the Switch?

01:28:37 25 A. Yes. The Switch is unique in that it can either be

01:28:42 1 plugged into the wall and the television and run with very
01:28:46 2 high performance, or it can be used as a handheld device
01:28:51 3 that's not plugged in using battery and connected to a WiFi
01:28:54 4 network.

01:28:55 5 **Q.** How does the performance of *Fortnite* in particular vary
01:28:58 6 between the smartphone and the Switch if there is any
01:29:02 7 difference?

01:29:03 8 **A.** The performance of *Fortnite* on smartphones and Switch is
01:29:08 9 similar. The big difference with Switch is that it only works
01:29:12 10 when it is connected to a WiFi network, so you can't use it on
01:29:20 11 as many on-the-go scenarios.

01:29:22 12 **Q.** I'm going to show you some request devices, and ask you if
01:29:26 13 you recognize them. I'll --

01:29:29 14 **THE COURT:** So, Ms. Forrest, as you know, our
01:29:32 15 movable -- if you are not standing at the mic, no one outside
01:29:37 16 this courtroom, and, in fact, maybe not even people in the
01:29:41 17 courtroom, can hear you.

01:29:42 18 **MS. FORREST:** Thank you.

01:29:42 19 **THE COURT:** Mr. Bornstein, maybe you can move that
01:29:45 20 table over for her so that she can actually access it while
01:29:49 21 she is at the mic.

01:29:58 22 **BY MS. FORREST:**

01:29:58 23 **Q.** Mr. Sweeney, I would like to show you a device that has
01:30:01 24 been labeled for identification as PX277.

01:30:05 25 **MS. FORREST:** May I approach, Your Honor?

01:31:49 25 **MR. DOREN:** No objection.

01:31:50 1 **THE COURT:** Okay. Well, I'll admit them and we
01:31:53 2 will --

01:31:56 3 **MR. DOREN:** We can raffle them at the end of the
01:31:58 4 case.

01:31:58 5 **THE COURT:** I do have to say one of my favorite cases
01:32:00 6 was a wine trademark case, and I admitted into evidence about
01:32:04 7 30 bottles of wine. And at the end of the case, I did send
01:32:08 8 out an order to all the parties saying within the next 30 days
01:32:11 9 you must retrieve all your evidence or the Court will dispose
01:32:15 10 of it.

01:32:16 11 At which point in day 31, all of the law clerks came to
01:32:21 12 chambers and we promptly disposed of the evidence.

01:32:27 13 Go ahead.

01:32:29 14 (Plaintiff's Exhibits 2776, 2777, 2778 received in evidence)

01:32:29 15 **BY MS. FORREST:**

01:32:29 16 **Q.** Mr. Sweeney, does Epic have any *Fortnite* distribution
01:32:34 17 agreements with console makers?

01:32:36 18 **A.** Yes.

01:32:37 19 **Q.** Does Epic pay the console makers any form of compensation
01:32:41 20 in connection with those distribution agreements?

01:32:44 21 **A.** Yes.

01:32:44 22 **Q.** What is the word for the compensation that is paid?

01:32:48 23 **A.** It's a generally called a "commission" or a "console fee."

01:32:52 24 **Q.** And what is the typical, if there is a typical, commission
01:32:55 25 that Epic pays to the console makers for distribution?

01:32:59 1 A. It's 30 percent.

01:33:00 2 Q. And prior to August 2020, did Epic pay Apple a commission
01:33:06 3 in connection with the distribution of *Fortnite*?

01:33:10 4 A. Yes.

01:33:11 5 Q. In Epic's view is there a difference between the
01:33:12 6 30-percent commission that it pays to console makers and the
01:33:16 7 30-percent commission it paid to Apple prior to August 2020?

01:33:20 8 MR. DOREN: Objection, Your Honor. First of all,
01:33:22 9 foundation. The question was as to Epic as opposed to
01:33:24 10 Mr. Sweeney.

01:33:26 11 And second of all, it calls for a narrative.

01:33:30 12 MS. FORREST: Calls for, I'm sorry?

01:33:30 13 THE COURT: He said calls for a narrative.

01:33:33 14 I don't think it calls for a narrative. That is
01:33:35 15 overruled.

01:33:35 16 But you can rephrase with respect to the other.

01:33:40 17 BY MS. FORREST:

01:33:41 18 Q. All right. Mr. Sweeney, in your view as the CEO of Epic,
01:33:46 19 is there any difference between the 30-percent commission that
01:33:50 20 is paid to console makers by Epic and the 30-percent
01:33:53 21 commission that is paid by Epic to Apple?

01:33:56 22 A. Yes.

01:33:57 23 Q. Can you please describe that for the Court.

01:34:00 24 A. Yes. The general bargain in the console industry has long
01:34:05 25 been the idea that console hardware is often sold at or below

01:34:10 1 its manufacturing cost in order to bring in the larger user
01:34:14 2 base. And then the cost is offset by contributions by the
01:34:18 3 software developers to the hardware.

01:34:20 4 And so the intended effect of this is quite different than
01:34:25 5 the smartphone model where the user buys a device by a
01:34:28 6 business that is typically in the profit. And then the public
01:34:32 7 shares are forced to pay a commission to the platform maker
01:34:36 8 outside of any -- negotiated Epic -- sorry, negotiated
01:34:42 9 economic bargain which is aimed at making hardware more widely
01:34:47 10 available to customers in the general --

01:34:53 11 **THE COURT:** Can I ask you, *Fortnite*, is there a
01:34:55 12 version of *Fortnite* that you are using right now? Or is it
01:34:59 13 just *Fortnite*? Is it *Fortnite* 10, 2.0?

01:35:05 14 **THE WITNESS:** Well, *Fortnite* is just evolving. We
01:35:09 15 have never made a sequel.

01:35:12 16 **THE COURT:** Okay. So in 2007 or 2008 was *Fortnite*,
01:35:15 17 the technology required to play *Fortnite*, could that have been
01:35:19 18 played on an iPhone?

01:35:23 19 **THE WITNESS:** No, Your Honor. In that time frame the
01:35:25 20 iPhone was not powerful enough to play a game as graphically
01:35:30 21 elaborate as *Fortnite*.

01:35:33 22 **THE COURT:** So even though you've mentioned that
01:35:35 23 this -- something about the console hardware, Apple did have
01:35:39 24 to do something to the iPhone itself; right, in terms of the
01:35:43 25 technology of the iPhone in order for it to be sophisticated

01:35:47 1 enough to play your software?

01:35:49 2 **THE WITNESS:** Yes.

01:35:51 3 **THE COURT:** So how is that any different from
01:35:54 4 consoles, not so much about the payment fees but about the
01:35:58 5 development of the technology that allows your product to be
01:36:02 6 played?

01:36:03 7 **THE WITNESS:** I think the development of the hardware
01:36:05 8 technology and the operating system is very similar. My
01:36:09 9 comparison is only the differences between the business models
01:36:13 10 underlying the different platforms.

01:36:17 11 **THE COURT:** Okay. Continue.

01:36:19 12 **MS. FORREST:** Let me see, Your Honor, if I can ask a
01:36:21 13 few questions in that area.

01:36:23 14 **BY MS. FORREST:**

01:36:23 15 **Q.** Mr. Sweeney, are there any graphical performance
01:36:26 16 differences between the iPhone as it exists in August 2020 and
01:36:30 17 the consoles as they existed in August 2020?

01:36:34 18 **A.** Yes. Consoles have considerably more graphics
01:36:39 19 performance; therefore, the capability of displaying more
01:36:43 20 realistic images.

01:36:44 21 **Q.** And are there any other differences between the speed at
01:36:50 22 which the consoles were able to execute the *Fortnite*
01:36:57 23 application on consoles versus on a smartphone?

01:37:00 24 **A.** Consoles generally have more computing performance similar
01:37:05 25 to run more realistic simulations, such as particle systems.

01:37:12 1 Q. Does Epic distribute *Fortnite* on PCs?

01:37:17 2 A. Yes.

01:37:17 3 Q. And how is *Fortnite* obtained for a PC?

01:37:22 4 A. *Fortnite* on PC is available from the Epic Games Store.

01:37:24 5 You obtain it by installing the Epic Games Store from the

01:37:30 6 website, if you don't already have it, and then clicking on a

01:37:32 7 button to download *Fortnite*, which is available for free.

01:37:36 8 Q. All right. Can you compare the performance of *Fortnite* on

01:37:39 9 a PC versus the performance on a smartphone?

01:37:42 10 A. Well, PC ranges from very low-end laptop devices, which

01:37:52 11 have similar performance to a high-end smartphone, all the way

01:37:57 12 up to desktop PCs, which have far more performance, sometimes

01:38:01 13 at 20 times more graphics performance.

01:38:04 14 Q. And do these differences and similarities have any

01:38:08 15 significance for gaming?

01:38:09 16 A. Yes. It makes the experience of *Fortnite* very different

01:38:14 17 between console, PC, and smartphone devices.

01:38:18 18 Q. Let's change topics for a moment. And you mentioned

01:38:23 19 Project Liberty earlier at the very outset of your testimony.

01:38:28 20 What was Project Liberty?

01:38:30 21 A. Project Liberty it is the code name that we gave within

01:38:33 22 Epic to our project to challenge the smartphone maker

01:38:40 23 policies, both Apple's and Google's.

01:38:43 24 Q. Let's put Project Liberty to one side for a moment.

01:38:47 25 Can you think of any instances that you are aware of when

01:38:53 1 Epic deliberately broke any Apple rules in connection with a
01:38:57 2 distribution of *Fortnite* on iOS other than Project Liberty?

01:39:01 3 **A.** No, not that I am aware of.

01:39:03 4 **Q.** Has Epic ever operated at variance from Apple's policies
01:39:07 5 that you are aware of?

01:39:08 6 **A.** Yes.

01:39:09 7 **Q.** And can you describe the instance or instances that you
01:39:13 8 are aware of?

01:39:14 9 **A.** Well, there are two general cases. One is we at times had
01:39:19 10 a misunderstanding of policy. Or we've had bugs in our
01:39:24 11 software, which caused a policy violation. And number two, we
01:39:29 12 have, many times, talked to Apple about their policy and
01:39:35 13 received a waiver from their policy, either for a limited
01:39:41 14 period of time or in general.

01:39:43 15 **Q.** All right. Are you familiar with something called the
01:39:45 16 Apple Enterprise Program?

01:39:47 17 **A.** Yes.

01:39:48 18 **Q.** What is that?

01:39:49 19 **A.** The Apple Enterprise Program is an Apple program enabling
01:39:57 20 corporations to develop software for iOS and to distribute
01:40:01 21 their iOS software directly to their employees without being
01:40:06 22 subject to the iOS review guidelines and without
01:40:09 23 distributing their app through the iOS App Store.

01:40:14 24 **Q.** Are you familiar with something called the enterprise
01:40:14 25 certificate?

01:40:16 1 A. Yes.

01:40:16 2 Q. What is that?

01:40:19 3 A. This is a software sign-in certificate which enables an
01:40:24 4 enterprise, or a corporation, to place their own stamp of
01:40:29 5 approval on the software and allowing users to have that
01:40:35 6 certificate installed on their iOS device to install software
01:40:40 7 from that corporation without going through the App Store.

01:40:44 8 Q. Was there ever any time that Epic considered the
01:40:47 9 feasibility of using an enterprise certificate to distribute
01:40:50 10 an app?

01:40:53 11 A. Yes. I started a project to explore the technical and
01:40:54 12 legal feasibility of using an Apple enterprise certificate in
01:41:00 13 order to distribute software directly to consumers on iOS.

01:41:04 14 Q. Did Epic ever distribute an app to consumers using an
01:41:09 15 Apple enterprise certificate?

01:41:12 16 A. No.

01:41:14 17 Q. Let's turn to the summer of 2020.

01:41:16 18 Did there come a time when Apple removed *Fortnite* from the
01:41:22 19 App Store?

01:41:23 20 A. Yes.

01:41:23 21 Q. Do you recall approximately the date?

01:41:23 22 A. That was August 13, 2020.

01:41:26 23 Q. All right. Prior to August 13, 2020, did you have any
01:41:30 24 discussions with Apple regarding any changes that you wanted
01:41:35 25 them to make?

01:41:36 1 **A.** Yes. Epic had attempted to have discussions with Apple
01:41:41 2 since at least 2015, possibly even earlier. We received no --
01:41:46 3 we hadn't -- Apple had not been one to have a serious
01:41:51 4 discussion on the topic. So around June of 2020, I sent Apple
01:41:56 5 leadership a letter with some very specific requests by Epic
01:42:01 6 to Apple to allow us to release -- a store for iOS and to
01:42:07 7 accept direct payments on iOS.

01:42:10 8 **Q.** All right. Let me -- was there other correspondence that
01:42:13 9 you exchanged with Apple prior to August 2020 that related to
01:42:18 10 the same general set of issues?

01:42:22 11 **A.** I remember --

01:42:23 12 **Q.** You don't have to describe all of them, just whether or
01:42:26 13 not there was.

01:42:27 14 **A.** Certainly. There were around a dozen outreach attempts by
01:42:29 15 myself and Epic vice president, Mark Rein, R-E-I-N, to try to
01:42:37 16 arrange a meeting with Apple leadership folks to discuss
01:42:41 17 opening up iOS as a platform. And other than a chance
01:42:45 18 encounter between myself and Mike Fischer for about five
01:42:49 19 minutes, there was no discussion at all.

01:42:52 20 **Q.** I would like to show you what has been marked for
01:42:55 21 identification as DX4477.

01:42:58 22 **MS. FORREST:** Your Honor, may I approach?

01:43:01 23 **THE COURT:** You may.

01:43:05 24 (Exhibit handed to witness.)

01:43:11 25 **MS. FORREST:** Your Honor, this is not on the list

01:43:13 1 that had been provided earlier. It came up during the opening
01:43:15 2 this morning, so I can provide Your Honor with a copy right
01:43:18 3 now. Or the clerk if you would like.

01:43:20 4 **THE COURT:** Okay. That's fine. 4477?

01:43:24 5 **MS. FORREST:** It's DX4477.

01:43:24 6 Would the clerks like a copy as well?

01:43:29 7 **THE WITNESS:** I'm sorry, I should say there were no
01:43:31 8 discussions between Epic and Apple leadership folks. Other
01:43:35 9 than the Matt Fischer discussion, I didn't have the
01:43:38 10 opportunity to share my thoughts with various Apple employees
01:43:38 11 at a lower level.

01:43:43 12 **THE COURT:** Do you have a copy, Mr. Doren?

01:43:45 13 **MR. DOREN:** I do not.

01:43:51 14 **BY MS. FORREST:**

01:43:54 15 **Q.** If you could review this document, Mr. Sweeney, and let me
01:43:59 16 know when you've done so.

01:44:02 17 **A.** Yes, I have.

01:44:03 18 **Q.** All right. Do you recognize what has been marked for
01:44:06 19 identification as DX4477?

01:44:10 20 **A.** Yes. This is the letter -- the email I sent to the Apple
01:44:15 21 executive team on June 30th asking for permission to do these
01:44:19 22 things.

01:44:20 23 **MS. FORREST:** All right. Your Honor, I would offer
01:44:22 24 DX4477 into evidence.

01:44:25 25 **THE COURT:** Any objection?

01:44:25 1 **MR. DOREN:** None.

01:44:26 2 **THE COURT:** Admitted.

01:44:29 3 (Defendant's Exhibit 4477 received in evidence)

01:44:29 4 **BY MS. FORREST:**

01:44:30 5 **Q.** All right. Mr. Sweeney, this morning during the opening
01:44:32 6 there was a reference to a side letter that counsel indicated
01:44:38 7 Epic might seek. Do you recall that?

01:44:41 8 **A.** Yes.

01:44:41 9 **Q.** All right. Turn, if you would please, to DX4477. And
01:44:48 10 tell me, if you can, whether or not Epic was asking for a
01:44:51 11 special deal in this document.

01:44:54 12 **A.** Yes. Epic was asking for two things. First of all,
01:44:57 13 permission to operate our store and payment service. And then
01:45:04 14 I asked -- I'm sorry, I expressed hope that Apple would make
01:45:10 15 these features available to all developers --

01:45:14 16 **Q.** I'm sorry, sir. Let's have you start over again on your
01:45:16 17 answer. I think the court reporter would like it maybe nice
01:45:20 18 and slow.

01:45:24 19 **A.** My purpose of writing the letter was two things: First of
01:45:27 20 all, to ask for permission for Epic to release a store and use
01:45:32 21 our own payment service on iOS. And second, to express the
01:45:35 22 hope that Apple would make these features available to all
01:45:39 23 developers.

01:45:39 24 **Q.** Where in the letter is there a reference to Epic asking to
01:45:43 25 have these features made available to all developers?

01:45:55 1 **A.** In the fourth paragraph I say, we hope Apple will also
01:45:59 2 make these options equally available to all iOS developers
01:46:03 3 in order to make software sales and distribution on the iOS
01:46:07 4 platform as open and competitive as it is on personal
01:46:12 5 computers.

01:46:13 6 **Q.** What was the purpose for the reference to "side letter" in
01:46:16 7 this document DX4477?

01:46:21 8 **A.** My understanding is Epic was under a contract of adhesion,
01:46:24 9 a nonnegotiable contract. And before going -- essentially
01:46:30 10 going to war with Apple over the policies, I felt that Epic
01:46:33 11 should make all attempts we could in order to seek an agreed
01:46:38 12 resolution to our concerns.

01:46:42 13 **MR. DOREN:** Objection, Your Honor. Move to strike as
01:46:44 14 a statement of legal conclusion.

01:46:46 15 **THE COURT:** Overruled. He can testify as to his
01:46:49 16 belief.

01:46:50 17 **MR. DOREN:** Thank you, Your Honor.

01:46:51 18 **BY MS. FORREST:**

01:46:53 19 **Q.** Let's talk about Project Liberty. What was Project
01:46:56 20 Liberty?

01:46:58 21 **A.** Project Liberty was Epic's -- was the code name used
01:47:03 22 internally within Epic to refer to our overarching effort to
01:47:07 23 challenge Apple's and Google's smartphone policies.

01:47:14 24 **Q.** When did Project Liberty start?

01:47:16 25 **A.** The idea for Project Liberty developed throughout 2019.

01:47:21 1 We began making significant planning and preparations for it
01:47:28 2 in early 2020. And by around the first quarter of 2020, had
01:47:38 3 made our plan of record to pursue Project Liberty and to
01:47:42 4 challenge Apple and Google.

01:47:46 5 **Q.** And did Epic make any preparations in connection with
01:47:51 6 Project Liberty?

01:47:52 7 **A.** Yes. We spent many months on extensive preparation
01:47:56 8 throughout many different parts of our company.

01:48:00 9 **Q.** Why?

01:48:01 10 **A.** We were challenging the two most powerful companies in the
01:48:06 11 world. It would have been foolish to do anything less.

01:48:10 12 **Q.** Let's talk about what happened on August 13, 2020. What
01:48:14 13 happened on that day with regard to the *Fortnite* app on iOS?

01:48:22 14 **A.** Epic had prepared a hot fix, basically a server-side
01:48:26 15 change --

01:48:27 16 **Q.** Hold on one second. The court reporter, I think, didn't
01:48:27 17 quite get that.

01:48:27 18 **A.** Hot fix, which is a server-side configuration change made
01:48:38 19 by Epic which instructs the *Fortnite* software that was already
01:48:43 20 on the users' devices to change its configuration in some way.

01:48:48 21 We make a lot of hot fixes, but this one was very unlike
01:48:52 22 all the others in that this hot fix enabled Epic's direct
01:48:57 23 payment system to become available on iOS, which we did at
01:49:00 24 5:00 a.m. Eastern Time on August 13, 2020.

01:49:07 25 **Q.** Stop there for a moment, and let me just ask you to tell

01:49:07 1 the Court what a server-side change means.

01:49:12 2 **A.** Certainly.

01:49:12 3 A server-side change or hot fix is a common technique used
01:49:18 4 by developers to update their apps without submitting a new
01:49:22 5 version through the iOS app-review process. It's commonly
01:49:26 6 used to update minor features of an app, for example, to
01:49:30 7 update the *Fortnite* catalog of items that are available. It
01:49:33 8 changes daily. Or to make other configuration changes.

01:49:39 9 A hot fix does not involve installing new code on an iOS
01:49:42 10 device. Rather, it relies on just getting the existing code
01:49:46 11 on the iOS device's new instructions on what it should
01:49:50 12 display.

01:49:51 13 **Q.** Were there any --

01:49:53 14 **THE COURT:** Mr. Sweeney, you agree that it wasn't a
01:49:55 15 minor feature; right? You agree.

01:49:58 16 **THE WITNESS:** Yes, absolutely. The introduction of
01:50:01 17 Epic Direct Payment was a very major change.

01:50:04 18 **THE COURT:** Right. So even though hot fixes are used
01:50:06 19 for minor features, you used it for a different purpose?

01:50:10 20 **THE WITNESS:** Yes.

01:50:11 21 **THE COURT:** Okay. Proceed.

01:50:11 22 **BY MS. FORREST:**

01:50:12 23 **Q.** Did you understand that the hot fix was in violation of
01:50:14 24 Apple's terms and conditions?

01:50:18 25 **A.** Yes. The hot fix turned on Epic Direct Payment, which we

01:50:23 1 understand was in direct violation of Apple's terms.

01:50:25 2 **Q.** You understood that prior to August 13, 2020?

01:50:28 3 **A.** Yes.

01:50:29 4 **Q.** Why did Apple -- I am sorry, strike that.

01:50:32 5 Why did Epic plan deliberately to violate Apple's rules?

01:50:42 6 **A.** To show the world through conspiracy actions exactly what
01:50:45 7 the ramifications of Apple's policies were. Because I felt it
01:50:52 8 was very easy to mistake Apple's business model for just
01:50:57 9 software distribution; whereas I wanted the world to see that
01:51:02 10 Apple exercises total control of its availability of all
01:51:07 11 software on iOS and that it uses that control and can use
01:51:13 12 that control to deny users access to apps that have things --

01:51:18 13 **THE COURT:** Mr. Sweeney, at this time before you did
01:51:20 14 this, did you contact the lawyers who had already sued Apple
01:51:24 15 on this same topic, the lawyers who were representing a class
01:51:28 16 of developers? Did you contact them?

01:51:33 17 **THE WITNESS:** I don't know if that -- if counsel
01:51:35 18 contacted them or not. I didn't -- I wasn't involved in any
01:51:40 19 contact.

01:51:41 20 **THE COURT:** But you knew that there was a lawsuit
01:51:42 21 already on behalf of all developers against Apple, didn't you?

01:51:45 22 **THE WITNESS:** Yes, Your Honor.

01:51:46 23 **THE COURT:** And you just ignored that and went
01:51:49 24 forward on your own?

01:51:50 25 **THE WITNESS:** Yes.

01:51:51 1 **THE COURT:** Proceed.

01:51:52 2 **BY MS. FORREST:**

01:51:53 3 **Q.** Did Epic take any pricing action on August 13, 2020?

01:51:59 4 **A.** Yes.

01:52:00 5 **Q.** Can you describe that for the Court.

01:52:03 6 **A.** Yes.

01:52:03 7 At the same time we introduced this hot fix iOS, we
01:52:08 8 introduced a different hot fix on other platforms implementing
01:52:13 9 what we called the *Fortnite* Mega Drop, which represented an
01:52:18 10 approximately 20 percent price drop in the price of *Fortnite*
01:52:21 11 items offered to users for sale with the distinction on iOS
01:52:31 12 and Android platforms being that users who use Epic's Direct
01:52:37 13 Payment System could purchase items at Epic's new discounted
01:52:42 14 rates, while customers who used Apple's In-App Purchase
01:52:48 15 system, or Google's, were offered the previous rates that had
01:52:52 16 been in effect before the price drop.

01:52:55 17 **Q.** Was there any relationship between the Mega Drop and the
01:52:59 18 implementation of the hot fix on iOS?

01:53:07 19 **A.** Yes. I wanted to demonstrate to the world that Epic was
01:53:12 20 using direct payment in order to pass on savings to consumers
01:53:16 21 on iOS and Android, so that the correlation between these
01:53:24 22 30 percent platform fees or commissions and consumer prices
01:53:28 23 was made abundantly clear.

01:53:31 24 **Q.** Approximately how many hours after the hot fix that put
01:53:35 25 Epic Direct Pay on to iOS was activated did Apple remove

01:53:42 1 *Fortnite* or delete it from the App Store?

01:53:47 2 **A.** My recollection, which is a bit spotty, is between seven

01:53:51 3 and nine hours between a release of the hot fix and Apple

01:53:56 4 removing *Fortnite* from distribution.

01:53:58 5 **Q.** Was there any impact on *Fortnite* users as a result of that

01:54:02 6 delisting?

01:54:04 7 **A.** Yes. Users who did not have *Fortnite* on their devices

01:54:09 8 were not able to install *Fortnite* anew, and users who did have

01:54:13 9 a working version of *Fortnite* on iOS, were able to use it

01:54:19 10 but could not upgrade to the latest version.

01:54:23 11 **Q.** Do you know whether subsequent to the implementation of

01:54:27 12 the hot fix any users actually transacted any business through

01:54:33 13 Epic Direct Pay?

01:54:34 14 **A.** Yes.

01:54:35 15 **Q.** And do you know whether -- have you learned of any

01:54:39 16 security issues that their use of Epic Direct Pay introduced

01:54:44 17 on to any iOS device?

01:54:47 18 **A.** No.

01:54:47 19 **Q.** Do you know of any security issues that the hot fix itself

01:54:51 20 introduced on to any iOS device?

01:54:54 21 **A.** No.

01:54:55 22 **Q.** Did Apple take any other steps after removing *Fortnite*

01:54:59 23 from the App Store in relation to Epic as a result of the hot

01:55:03 24 fix?

01:55:04 25 **A.** Yes. Apple also sent Epic a letter saying that they would

01:55:08 1 remove our access to Apple platforms, meaning to iOS and
01:55:14 2 Mac, which would of course deprive us of the ability to
01:55:20 3 develop software on that platform.

01:55:24 4 **Q.** All right. And what is the status today of Epic Direct
01:55:27 5 Pay on the iOS devices that had it in place as of August 13,
01:55:35 6 2020?

01:55:37 7 **A.** So at the time we introduced the hot fix, we offered both
01:55:42 8 Apple's payment service and Epic's side by side. About two
01:55:46 9 weeks later, Apple removed Epic's access to use Apple's In-App
01:55:51 10 Purchase system, so users who still had *Fortnite* on their
01:55:54 11 devices at that point were only able to make purchases using
01:55:59 12 Epic's Direct Payment system.

01:56:00 13 **Q.** Can users, iOS users who had the *Fortnite* app on their
01:56:06 14 devices as of August 13, 2020, engage in play today or
01:56:14 15 interaction with *Fortnite* users on any other device such as an
01:56:19 16 Xbox or a PlayStation or an Android?

01:56:23 17 **A.** No. All *Fortnite* users in a session need to be on the
01:56:28 18 same version of *Fortnite* so they have the latest version of
01:56:32 19 the *Fortnite* world and the latest content. And so when Apple
01:56:37 20 removed *Fortnite's* ability to update *Fortnite*, and Epic had
01:56:40 21 issued the next season launch for *Fortnite*, all the players on
01:56:44 22 other platforms could get the latest version and moved on
01:56:47 23 while the iOS players were left behind on the old version.
01:56:50 24 And they were only compatible with other iOS players, and so
01:56:54 25 those iOS players can now only play with other iOS

01:56:57 1 players.

01:56:58 2 **Q.** Did any consumers respond to the availability of Epic
01:57:02 3 Direct Pay on iOS on August 13, 2020?

01:57:09 4 **A.** Yes.

01:57:11 5 **MS. FORREST:** One moment, please.

01:57:12 6 I have no further questions at this time. The witness is
01:57:31 7 turned over for cross-examination.

01:57:32 8 **THE COURT:** Mr. Doren, cross.

01:57:34 9 **MR. DOREN:** Thank you, Your Honor.

01:57:34 10 **CROSS-EXAMINATION**

01:57:35 11 **BY MR. DOREN:**

01:57:35 12 **Q.** Good afternoon, Mr. Sweeney.

01:58:00 13 **A.** Good afternoon.

01:58:01 14 **Q.** I have looked at you through a Zoom screen, and now I am
01:58:05 15 looking at you through four pieces of plastic, but we will
01:58:10 16 muddle through.

01:58:12 17 I would just like to start with a couple of points that
01:58:15 18 Epic's counsel raised with you. The first one being one of
01:58:19 19 the last points, which was about the 20 percent Mega Drop that
01:58:25 20 was on August 13, 2020.

01:58:27 21 Do you recall that topic?

01:58:30 22 **A.** Yes.

01:58:31 23 **Q.** And you testified, at least as I heard it, that the reason
01:58:35 24 that this 20 percent price drop was made was to show the
01:58:40 25 correlation between the 30 percent platform fee and price

01:58:44 1 pressure; is that right?

01:58:46 2 **A.** I think I said specifically our goal was to demonstrate on
01:58:52 3 smartphones that removal of the platform created in savings --

01:59:02 4 **THE COURT REPORTER:** I'm sorry. You need to repeat
01:59:02 5 that please.

01:59:02 6 **THE WITNESS:** I'm sorry. I believe I said that we
01:59:05 7 wanted to demonstrate to smartphone owners that removing the
01:59:08 8 platform fees resulted in savings to them.

01:59:12 9 **BY MR. DOREN:**

01:59:15 10 **Q.** And after the hot fix was implemented, as you've already
01:59:19 11 noted, Apple took *Fortnite* off the store; correct?

01:59:23 12 **A.** Yes.

01:59:24 13 **Q.** And Apple -- excuse me, *Fortnite* continued to be available
01:59:28 14 on, for example, Microsoft Xbox, PlayStation -- and Sony
01:59:34 15 PlayStation, and Nintendo Switch; correct?

01:59:38 16 **A.** Yes.

01:59:38 17 **Q.** And each of those, the players on each of those consoles
01:59:45 18 received a 20 percent price discount on all V-Bucks; correct?

01:59:49 19 **A.** Yes.

01:59:49 20 **Q.** But Epic continued to pay a 30-percent commission to
01:59:54 21 Nintendo and Sony and Microsoft, correct?

01:59:58 22 **A.** Yes.

01:59:58 23 **Q.** So the fact that there was a 20 percent decrease in price,
02:00:05 24 had nothing to do with the elimination of the 30-percent
02:00:08 25 commission on any of those three platforms, correct?

02:00:12 1 **A.** Correct. We subscribe to the idea of subsidized hardware
02:00:17 2 and felt that we were a beneficiary of that.

02:00:21 3 **Q.** But there were two reasons why you lowered the prices;
02:00:25 4 right? One was for a public relations campaign to back up
02:00:31 5 your Project Liberty plot against Apple; correct?

02:00:37 6 **A.** We wanted to demonstrate the savings. Yes, we explained
02:00:41 7 it to the public through PR.

02:00:44 8 **Q.** And the other was to try and create some excitement around
02:00:50 9 buying more -- making more in-app purchases within *Fortnite*
02:00:53 10 because you were concerned that interest in the game was
02:00:56 11 flagging over the long run; correct?

02:00:58 12 **A.** The first part is correct; the second part is not.

02:01:04 13 **Q.** And you continue today to pay 30-percent commissions to
02:01:08 14 Microsoft, Nintendo, and Sony; correct?

02:01:11 15 **A.** Yes.

02:01:12 16 **Q.** And the price of V-Bucks continues to be 20 percent lower
02:01:17 17 than it was on August 12, 2020; correct?

02:01:21 18 **A.** Yes.

02:01:24 19 **Q.** We also heard quite a bit about *Unreal Engine*.

02:01:29 20 **A.** Yes.

02:01:29 21 **Q.** And I would like to read you a few statements from counsel
02:01:32 22 for Epic at the August 19, 2020 scheduling hearing, and I
02:01:39 23 would like you to tell me whether you agree with these
02:01:42 24 statements.

02:01:44 25 First of all, *Unreal Engine* is not party to the same

02:01:48 1 contractual arrangements with Apple that are applicable to
02:01:51 2 *Fortnite*.

02:01:52 3 Is that a true statement?

02:01:53 4 **A.** Yes. That's my understanding.

02:01:56 5 **Q.** It is a different company.

02:01:57 6 Is that a true statement?

02:02:02 7 **A.** I think -- my understanding is that the *Unreal Engine*

02:02:05 8 software is distributed on iOS is distributed through --

02:02:09 9 yes, a different company's entity than Epic Games

02:02:13 10 Incorporated.

02:02:16 11 **Q.** And that company is in Switzerland; correct?

02:02:18 12 **A.** Yes.

02:02:19 13 **Q.** And again quoting counsel, the *Unreal Engine* has nothing
02:02:23 14 to do with the Apple App Store.

02:02:28 15 Is that statement correct?

02:02:32 16 **A.** I think there are relationships between the *Unreal Engine*
02:02:35 17 and the Apple App Store. We have our apps that are on the
02:02:41 18 Apple App Store.

02:02:42 19 **Q.** So in other words, *Unreal Engine* is a game engine; is that
02:02:45 20 right?

02:02:46 21 **A.** *Unreal Engine* is used for games and other nongaming usage
02:02:50 22 in enterprise applications.

02:02:51 23 **Q.** It is something that developers use in creating games or
02:02:54 24 other applications, it's not a consumer-facing product;
02:02:59 25 correct?

02:03:00 1 A. That's right.

02:03:01 2 Q. And, again, quoting counsel, it has nothing to do with

02:03:03 3 Epic Pay; correct?

02:03:06 4 A. Right.

02:03:07 5 Q. It's really apples and oranges, *Fortnite* versus *Unreal*

02:03:12 6 *Engine*; correct?

02:03:14 7 A. *Unreal Engine* is an engine that powers *Fortnite*. They are

02:03:19 8 separate products. *Fortnite* is for consumers; *Unreal Engine*

02:03:21 9 is for developers.

02:03:24 10 Q. And just to be clear, there is no *Unreal Engine* app for

02:03:27 11 *Unreal Engine* itself on iOS; correct?

02:03:35 12 A. That's right. There's several *Unreal Engine*-related tools

02:03:38 13 on iOS, but they are not the *Unreal Engine* -- editor app

02:03:44 14 that runs on Windows and Mac app.

02:03:47 15 Q. And to be clear as of today, *Unreal Engine* continues to

02:03:50 16 have access to all of Apple's developer tools, and it

02:03:57 17 continues to support developers who are making apps for iOS;

02:04:02 18 correct?

02:04:03 19 A. Yes. Of course.

02:04:05 20 Q. And one of the reasons that *Unreal Engines* is a successful

02:04:09 21 business is because it helps developers to create apps for

02:04:13 22 eight different operating platforms; correct?

02:04:15 23 A. Yes.

02:04:15 24 Q. So in other words, it creates a place where developers can

02:04:19 25 tap into your company, *Unreal Engine*, your other company's

02:04:24 1 expertise, in order to write apps for a variety of operating
02:04:29 2 systems so that they don't have to try and untangle the
02:04:33 3 differences among those eight different platforms; correct?

02:04:37 4 **A.** Yes. So the developers do have to do some work specific
02:04:40 5 to the platforms that they are reading some products on. We
02:04:44 6 eliminate much of the work but not all of it.

02:04:54 7 **Q.** And early on in your testimony -- and actually I'm going
02:04:58 8 to go back now to the Epic opening statement.

02:05:02 9 Counsel for your company said that this case is not about
02:05:07 10 the purchase of paid apps; it is only about in-app purchases.
02:05:12 11 Do you agree with that statement?

02:05:16 12 **A.** Yes. Epic doesn't challenge Apple's right to take a fee
02:05:23 13 for the distribution of these paid apps.

02:05:27 14 **Q.** So if an app requires payment when it's downloaded, Epic
02:05:32 15 has no quarrel with that?

02:05:34 16 **A.** It's a paid app, then yes.

02:05:36 17 **Q.** And Epic has no quarrel with a 30-percent commission being
02:05:40 18 charged on paid apps; correct?

02:05:46 19 **A.** We certainly do have a quarrel if Apple prevents the
02:05:52 20 existence of competing app stores, which would provide
02:05:55 21 competitive pressure to discipline (phonetic) prices. But if
02:05:59 22 Apple were -- if there were competitive app stores on iOS and
02:06:04 23 Epic, I wouldn't have any dispute with that approach.

02:06:08 24 **Q.** And Mr. Sweeney, let's focus on my question.

02:06:09 25 Epic does not dispute that Apple may charge a 30-percent

commission on paid app downloads; correct?

A. To the extent the iOS platform were opened up -- opened competing stores, it could offer other deals, Epic doesn't -- any of Apple's payment processing rates.

Q. So your only issue with Apple, more broadly than in-app purchases, is that you wish Apple permitted other stores in the App Store; correct?

A. That Apple permitted other stores in the App Store, that Apple permitted other stores on the iOS platform, including stores that could be installed from the web. And that Apple allowed competing payment processing methods in apps in the iOS App Store.

Q. So along with permitting other stores within Apple Store, you would want Apple to permit other stores to be sideloaded into the iOS environment?

A. Yes.

Q. Now, you own a controlling interest in Epic Games; is that correct?

A. Yes. My understanding is currently that my shareholdings make me the controlling shareholder.

THE COURT: Your what?

THE WITNESS: My understanding is my holdings of Epic stock make me the controlling shareholder in Epic, Your Honor.

BY MR. DOREN:

Q. And Epic was recently valued at \$28.7 billion; correct?

02:07:42 1 A. Yes.

02:07:44 2 Q. And I believe we've heard this already, but I just want to
02:07:47 3 be clear: You set the overall strategy for the company as
02:07:50 4 CEO; correct?

02:07:52 5 A. Yes.

02:07:52 6 Q. And you set the overall strategy in terms of this lawsuit
02:07:56 7 that has been brought in this court; correct?

02:07:58 8 A. Yes, I did.

02:07:59 9 Q. Now, Epic joined Apple's developer program in 2010;
02:08:04 10 correct?

02:08:07 11 A. Or thereabouts, yes.

02:08:10 12 Q. And you do recall, and it is in your proposed findings of
02:08:14 13 fact, that Epic joined the Apple developer program in 2010?
02:08:18 14 Is that true?

02:08:22 15 A. Yes.

02:08:23 16 Q. And at that time Epic signed the developer license
02:08:28 17 agreement -- the developer license agreement and a contract
02:08:35 18 known as -- I am sorry. Let me start over.

02:08:38 19 At that time Epic signed an Apple developer agreement;
02:08:41 20 correct?

02:08:46 21 A. I don't have a recollection of the specific contracts that
02:08:48 22 were in place at that time, but I agree that Epic signed the
02:08:53 23 required contracts at Apple.

02:08:55 24 Q. All right. And you would have no -- you wouldn't question
02:08:58 25 that one is an Apple developer agreement and then the second

02:09:01 1 is a developer program license agreement; correct?

02:09:05 2 **A.** No.

02:09:05 3 **Q.** And do you understand the Apple developer agreement, it
02:09:09 4 makes tools available for people who simply want to learn to
02:09:13 5 write iOS apps?

02:09:15 6 **A.** Yes.

02:09:15 7 **Q.** And do you know that that license is free for the person
02:09:18 8 who enters into it; correct?

02:09:19 9 **A.** I think so.

02:09:21 10 **Q.** And as to these licenses, and in particular the DPLA,
02:09:25 11 which, again, would be the acronym for developer program
02:09:29 12 license agreement, as the name suggests, that is a license
02:09:35 13 agreement, isn't it?

02:09:36 14 **A.** Yes.

02:09:36 15 **Q.** And you understand that Epic has licensed Apple's
02:09:41 16 intellectual property through that agreement; correct?

02:09:43 17 **A.** Yes.

02:09:44 18 **Q.** And that that license has limitations and restrictions on
02:09:48 19 what Epic can do with Apple's intellectual property; correct?

02:09:52 20 **A.** Yes.

02:09:53 21 **Q.** And that includes, under that license, Apple software
02:09:57 22 including its SDKs, APIs and other developer tools; right?

02:10:03 23 **A.** Yes.

02:10:09 24 **Q.** Now, the first game that Epic put on iOS, or made
02:10:14 25 available in the App Store, was *Infinity Blade*; is that right?

02:10:19 1 **A.** Yes.

02:10:19 2 **Q.** And was that a paid app?

02:10:21 3 **A.** Yes.

02:10:22 4 **Q.** And at the time -- do you recall that Apple first made

02:10:29 5 in-app purchase available in 2009?

02:10:33 6 **A.** Yes.

02:10:33 7 **Q.** And that would have been before you joined the developer

02:10:37 8 program; correct?

02:10:38 9 **A.** Yes.

02:10:39 10 **Q.** And do you recall that at the time you signed those

02:10:42 11 contracts that Apple prohibited at that time in 2010 a store

02:10:51 12 within a store? A store within a store?

02:10:57 13 **A.** I think that that was true of software stores within a

02:11:01 14 store, but not necessarily other types of stores.

02:11:06 15 **Q.** And you would agree, Mr. Sweeney, that at the time you

02:11:09 16 became a member, or Epic became a member, of the developer

02:11:14 17 program, that Apple also prohibited the use of alternative

02:11:20 18 payment processes; correct?

02:11:22 19 **A.** My understanding is that is true with respect to the

02:11:27 20 purchase of digital that can be consumed in-App.

02:11:31 21 **Q.** So your complaints here today as I understand them are

02:11:37 22 Apple's charging a commission on in-app purchases, Apple's

02:11:42 23 prohibiting Epic from putting a store within the App Store, or

02:11:49 24 sideloading one on to iOS, and Apple's requirement that all

02:11:53 25 payments be made using its commerce technology; correct?

02:11:56 1 Those are your four complaints?

02:11:59 2 **A.** Yes.

02:11:59 3 **Q.** Now all four of those limitations have been in the Apple

02:12:06 4 DPLA and guidelines since 2009; correct?

02:12:16 5 **A.** I don't have any reason to question that.

02:12:19 6 **Q.** Now, before Epic signed these contracts with Apple, you

02:12:24 7 had your lawyers look at them; correct?

02:12:27 8 **A.** Yes.

02:12:28 9 **Q.** And they reviewed them, and you discussed the terms with

02:12:31 10 them before you signed the contract; correct?

02:12:39 11 **A.** I know the lawyers reviewed them. I know I was aware of

02:12:42 12 them before we signed the contract.

02:12:47 13 **Q.** And after understanding the terms and after conferring

02:12:50 14 with counsel, Epic chose to enter into those contracts in

02:12:55 15 2010; right?

02:12:56 16 **A.** Yes.

02:12:57 17 **Q.** Epic didn't raise any objections with Apple about the

02:13:00 18 contracts at the time, did it?

02:13:01 19 **A.** No.

02:13:02 20 **Q.** And Epic didn't dispute that Apple had the right to decide

02:13:04 21 what apps it put in its App Store, did it?

02:13:13 22 **A.** I criticized that position numerous times over the past

02:13:21 23 decade, certainly Epic, when it signed the agreement, hadn't

02:13:25 24 made formal objection to these terms.

02:13:29 25 **Q.** So in other words, at the time you signed the contract,

02:13:32 1 you didn't voice any complaint or have any dispute with Apple
02:13:36 2 directly about its right to decide what apps it placed in its
02:13:43 3 App Store; correct?

02:13:44 4 **A.** I'm not sure about that. I know we did not attempt to
02:13:47 5 renegotiate that term in the contract.

02:13:49 6 **Q.** And Epic didn't object to the 30-percent commission
02:13:53 7 charged by Apple on sales of digital content through the App
02:13:57 8 Store; correct?

02:14:04 9 **A.** I don't remember.

02:14:07 10 **Q.** Now, in August 2020, we have heard a little bit about
02:14:10 11 Project Liberty and a little bit about what motivated you, but
02:14:13 12 let's speak plainly. In August 2020, you, as a shot caller at
02:14:21 13 Epic, chose to intentionally breach your contract with Apple;
02:14:24 14 correct?

02:14:24 15 **A.** Yes.

02:14:25 16 **Q.** And, again, so we are sure of what this involved, you put
02:14:28 17 undisclosed code in a build with *Fortnite*?

02:14:33 18 **A.** Yes.

02:14:34 19 **Q.** With the goal that it would not be discovered by Apple
02:14:37 20 through the app-review process?

02:14:39 21 **A.** Yes.

02:14:39 22 **Q.** That is part of why you made it a server-side trigger so
02:14:45 23 that it couldn't be found when you submitted the build; right?

02:14:47 24 **A.** Yes.

02:14:48 25 **Q.** And Epic used that code weeks later to place an

02:14:51 1 alternative payment function in *Fortnite*; correct? The Epic
02:14:54 2 Direct Pay function?

02:14:56 3 **A.** Yes.

02:14:56 4 **Q.** So the payments could be made directly to Epic Games;
02:15:01 5 right?

02:15:02 6 **A.** Yes, through a payment processor of our choosing.

02:15:05 7 **Q.** And Epic could avoid its contractual obligation to pay
02:15:09 8 Apple a commission; correct?

02:15:11 9 **A.** Yes.

02:15:12 10 **Q.** And you knew at the time you did that that it would lead
02:15:16 11 to the removal of Epic from the developer program; right?

02:15:22 12 **A.** I wasn't certain of that. I was very aware of the
02:15:25 13 possibility of it, and even the likelihood of it, but I was
02:15:29 14 not completely certain that Apple would respond by removing
02:15:32 15 *Fortnite*.

02:15:33 16 **Q.** You hoped maybe they would give into the pressure, given
02:15:36 17 the popularity of *Fortnite*; right?

02:15:38 18 **A.** I hoped Apple would seriously reconsider its policy then
02:15:42 19 and there.

02:15:43 20 **Q.** And, in fact, Apple has given you the opportunity, and has
02:15:47 21 left the opportunity open, for Epic to come back into the App
02:15:52 22 Store simply by coming into compliance with its contractual
02:15:54 23 obligations during the pendency of this litigation. You know
02:16:00 24 that, don't you?

02:16:00 25 **A.** Yes.

02:16:00 1 Q. But you have chosen not to take that path; correct?

02:16:04 2 A. That's right.

02:16:05 3 Q. Let's go back in time. Let's change topics here and go
02:16:10 4 back in time. We will come back to Project Liberty later in
02:16:13 5 time.

02:16:13 6 But back in the 1990's, Epic began distributing games for
02:16:18 7 other developers; correct?

02:16:19 8 A. We began publishing games for other developers.

02:16:22 9 Q. And the commission that you were charging at that time --
02:16:25 10 or rather the royalty that you paid the developers -- so let
02:16:33 11 me start over because I have now conflated two things.

02:16:36 12 The royalty that Epic paid developers for the games that
02:16:41 13 it published was 40 percent; correct?

02:16:43 14 A. Yes.

02:16:44 15 Q. Meaning that Epic retained 60 percent of the revenue;
02:16:48 16 correct?

02:16:50 17 A. Yes.

02:16:51 18 Q. And that was a good deal in your eyes for the developers
02:16:56 19 in that era; is that true?

02:16:58 20 A. Yes.

02:16:59 21 Q. And Epic maintained that 60/40 revenue share for all of
02:17:05 22 its publishing work, until at least 2008; correct?

02:17:10 23 A. I believe that our efforts for publishing third party
02:17:17 24 games were wound down in 1997 to 1999.

02:17:25 25 Q. That is when you entered into your own contract with the

02:17:28 1 publisher?

02:17:29 2 **A.** Yes, by that point Epic had shifted away from publishing
02:17:33 3 other companies' products to develop our products internally.

02:17:40 4 **Q.** And at 60/40, the revenue share offered by Epic was in
02:17:44 5 fact better than the typical game publisher paid developers,
02:17:49 6 wasn't it?

02:17:49 7 **A.** Yes.

02:17:50 8 **Q.** The typical arrangement was that the publisher kept 70 to
02:17:53 9 85 percent of the revenue; is that right?

02:17:56 10 **A.** Yes.

02:17:57 11 **Q.** And that the developer received 15 to 30 percent; correct?

02:18:01 12 **A.** Yes.

02:18:07 13 **Q.** Now, I know, sir, from our past discussions you are
02:18:09 14 familiar with the digital game transaction platform called
02:18:13 15 Steam.

02:18:15 16 **A.** I'm available -- I'm aware of the PC game store called
02:18:18 17 Steam.

02:18:19 18 **Q.** And that is owned by a company called Valve; is that
02:18:22 19 right?

02:18:23 20 **A.** Yet.

02:18:24 21 **Q.** And Steam is a digital game store, you say, that sells
02:18:29 22 games for PCs?

02:18:30 23 **A.** PC and Mac.

02:18:33 24 **Q.** Just so the record is clear, those are the two platforms
02:18:36 25 for which it sells games, PCs and Macs?

02:18:42 1 **A.** And also Linux.

02:18:44 2 **Q.** Linux, the Linux operating system?

02:18:46 3 **A.** Yes.

02:18:46 4 **Q.** And Steam began business in 2003; correct?

02:18:51 5 **A.** That is my recollection.

02:18:53 6 **Q.** And Steam offered developers a much different revenue

02:18:57 7 share than game publishers did at the time; right?

02:19:03 8 **A.** Steam offered, yes, a better revenue share for developers

02:19:06 9 and publishers.

02:19:08 10 **Q.** And that revenue share was that developers received

02:19:12 11 70 percent of the revenue; correct?

02:19:15 12 **A.** Yes.

02:19:15 13 **Q.** And that Steam kept 30 percent; right?

02:19:19 14 **A.** Yes.

02:19:19 15 **Q.** And Steam was the first digital game distribution -- or

02:19:24 16 digital game transaction platform to have any sort of large

02:19:28 17 scale commercial success; right?

02:19:31 18 **A.** It was the first really mainstream successful PC game

02:19:36 19 store.

02:19:37 20 **Q.** And any type of digital game store; correct, not just PC?

02:19:43 21 It was the first success -- commercial success as a digital

02:19:48 22 game platform; correct?

02:19:49 23 **A.** Yes. To my knowledge Steam was the first mainstream

02:20:02 24 successful digital game distribution platform among all

02:20:08 25 platforms.

02:20:10 1 Q. Now, after Steam launched in 2003, other digital game
02:20:15 2 transaction platforms soon followed, correct?

02:20:20 3 A. Yes.

02:20:22 4 Q. Xbox Live Marketplace launched in 2005. Do you recall
02:20:26 5 that?

02:20:29 6 A. Yes, or thereabouts.

02:20:31 7 Q. And some of these PlayStation stores launched in the same
02:20:34 8 time frame?

02:20:35 9 A. I think it was several years later, but generally yes.

02:20:40 10 Q. If I told you 2006, would that refresh your recollection?

02:20:44 11 A. No, but I don't have any reason to disagree.

02:20:48 12 Q. And the Nintendo game store opened in that same time
02:20:52 13 frame; correct?

02:20:54 14 A. I believe.

02:20:55 15 Q. In each of those stores -- Xbox Live, Sony PlayStation
02:20:59 16 store and the Nintendo store -- they each offered the same
02:21:03 17 70/30 revenue share that Steam did; correct?

02:21:07 18 A. That's my understanding.

02:21:08 19 Q. And other digital game stores came online during that same
02:21:12 20 period and also charged a 30-percent commission, sending
02:21:16 21 70 percent of the revenue to the distributor; correct --
02:21:20 22 excuse me, the developer; correct?

02:21:25 23 A. I'm not aware of other game stores that came online before
02:21:28 24 2010, but they certainly did following 2010.

02:21:33 25 Q. Well, we know for instance that Google Play came online in

02:21:39 1 2009; correct?

02:21:41 2 **A.** Oh, yes, you're right.

02:21:42 3 **Q.** And it charged 70/30; correct?

02:21:46 4 **A.** Yes.

02:21:46 5 **Q.** And still does today?

02:21:48 6 **A.** Yes.

02:21:48 7 **Q.** By the way, the -- well, excuse me. We will get there.

02:21:51 8 And then of course you know that the Apple App Store also

02:21:55 9 launched in 2009; correct?

02:21:57 10 **A.** Yes.

02:21:58 11 **Q.** Now, Epic -- just again recapping here, Epic currently

02:22:04 12 offers *Fortnite* on the PlayStation store; correct?

02:22:07 13 **A.** Yes.

02:22:07 14 **Q.** And the Xbox game store; is that right?

02:22:10 15 **A.** Yes.

02:22:11 16 **Q.** And the Nintendo game store?

02:22:13 17 **A.** Yes.

02:22:14 18 **Q.** And the Samsung Galaxy store?

02:22:18 19 **A.** Yes.

02:22:18 20 **Q.** As well as the Epic game store?

02:22:21 21 **A.** Yes.

02:22:21 22 **Q.** And geforcenow.com?

02:22:25 23 **A.** Yes.

02:22:25 24 **Q.** And on GeForce, there was a discussion about whether or

02:22:27 25 not there was a streaming opportunity currently on iOS, and

02:22:31 1 I understood your testimony to be that it would soon go into
02:22:36 2 beta testing for iOS. Do I have that correct?

02:22:41 3 **A.** That was my understanding as of a couple of months ago.

02:22:46 4 **Q.** And it was supposed to launch in April; right?

02:22:50 5 **A.** It was supposed to launch last year, and it has been going
02:22:54 6 through several delays.

02:22:55 7 **Q.** Well, we can find out about that maybe tomorrow when
02:22:59 8 Nvidia is here.

02:23:00 9 Now, Mr. Sweeney, where does the game -- on what platforms
02:23:06 10 does the game *Fortnite* currently stream through GeForce Now --
02:23:09 11 dot now?

02:23:11 12 **A.** It currently streams through PC and Mac.

02:23:15 13 **Q.** And you're proud of your game *Fortnite*?

02:23:19 14 **A.** Yes.

02:23:20 15 **Q.** And you would not present it on a platform or through a
02:23:23 16 service that would in any way denigrate the reputation of the
02:23:26 17 game?

02:23:27 18 **A.** Well, with respect to these video-streaming platforms,
02:23:36 19 Epic -- Epic has generally supported all of them in order to
02:23:39 20 foster the development of this industry, but in those services
02:23:42 21 my experience is it works well for some customers and doesn't
02:23:46 22 work for others.

02:23:47 23 **Q.** And what I heard you say is when you have a good internet
02:23:51 24 connection, it can be a pretty good experience?

02:23:54 25 **A.** When you have a great internet connection, it can be a

02:23:58 1 good experience.

02:23:59 2 Q. And you wouldn't be putting your game on a service that
02:24:02 3 didn't provide a great experience for the users; correct?

02:24:05 4 A. The services are -- they provide a great service to some
02:24:11 5 users and terrible service for other users, and the users
02:24:12 6 pretty quickly select in or out based on that.

02:24:16 7 Q. And you would agree with me that some of the largest, most
02:24:18 8 well-funded companies in the world have each launched
02:24:22 9 game-streaming services; correct?

02:24:27 10 A. Yes. Google and Microsoft and Nvidia.

02:24:33 11 Q. And Amazon as well; correct?

02:24:37 12 A. Yes.

02:24:38 13 Q. And that is Luna, the Amazon streaming service?

02:24:43 14 A. I think so.

02:24:44 15 Q. Let's talk about PlayStation and Sony for a moment.

02:24:49 16 THE COURT: Can I ask does 10 Cent stream as well?

02:24:53 17 BY MR. DOREN:

02:24:54 18 Q. Mr. Sweeney, does 10 Cent stream as well? Does it have a
02:24:58 19 streaming service?

02:24:59 20 A. Not that I am aware of. It is possible they may have a
02:25:01 21 service I guess in China, but I have not seen it.

02:25:05 22 THE COURT: Okay. Thank you.

02:25:06 23 BY MR. DOREN:

02:25:06 24 Q. And 10 Cent is the largest game distributor in the world;
02:25:10 25 is that fair?

02:25:11 1 A. That is my understanding.

02:25:12 2 Q. And 10 Cent owns 40 percent of Epic Games?

02:25:18 3 A. My understanding is that the ownership number is something

02:25:21 4 like 37 percent currently.

02:25:23 5 Q. And does 10 Cent still have two seats on your board?

02:25:26 6 A. Yes.

02:25:27 7 Q. And you are the chairman of the board; correct?

02:25:31 8 A. Yes.

02:25:31 9 Q. Now, turning to PlayStation, the Sony PlayStation is the

02:25:34 10 largest platform for *Fortnite* by revenue; correct?

02:25:38 11 A. Yes.

02:25:39 12 Q. About \$6 billion through the end of 2020, just from

02:25:43 13 *Fortnite* in-app purchases?

02:25:48 14 A. In the lifetime?

02:25:49 15 Q. Yes. Since its launch.

02:25:50 16 A. Yes.

02:25:51 17 Q. And that is out of about 13.1 billion made on in-app

02:25:55 18 purchases through *Fortnite* in total; correct? Through the end

02:26:01 19 of 2020?

02:26:06 20 A. In very rough terms, yes.

02:26:09 21 Q. And over the last year or so since early 2020 Sony has

02:26:14 22 made two different investments in Epic Games; correct?

02:26:19 23 A. Yes.

02:26:20 24 Q. Totaling about \$450 million?

02:26:23 25 A. Yes.

02:26:24 1 Q. And that purchases them an ownership interest of between 1
02:26:25 2 and 2 percent?

02:26:28 3 A. That's my understanding.

02:26:30 4 Q. And we've already established that Sony charges Epic a
02:26:34 5 30-percent commission on all in-app purchases made through the
02:26:37 6 PlayStation store; correct?

02:26:39 7 A. Yes.

02:26:40 8 Q. And if we can, sir, what I would like to do is put up a
02:26:46 9 chart to help us kind of sort through these different
02:26:49 10 platforms.

02:26:49 11 MR. DOREN: Mr. Spalding.

02:26:49 12 BY MR. DOREN:

02:26:49 13 Q. Do you see that in front of you, sir?

02:26:55 14 A. Yes.

02:26:55 15 Q. And on the left we have the three console makers; correct?

02:27:00 16 A. Yes.

02:27:00 17 Q. And then what I would like do as we discuss each of them
02:27:03 18 is talk about their commission structure, whether or not they
02:27:07 19 permit sideloading, and whether or not each of these platforms
02:27:11 20 require that their internal integrated commerce technology be
02:27:15 21 used to administer in-app purchases. All right?

02:27:19 22 A. Okay.

02:27:20 23 Q. So with Sony, we have already established that it charges
02:27:23 24 a 30-percent commission. Correct?

02:27:26 25 A. Yes.

02:27:27 1 Q. And Sony does not permit sideloading; correct?

02:27:31 2 A. Correct.

02:27:32 3 Q. Any game on Xbox to be digitally distributed must be made

02:27:39 4 through the PlayStation store; correct?

02:27:42 5 A. Yes.

02:27:43 6 Q. And all in-app purchases must be made using Sony's

02:27:49 7 integrated commerce technology; correct?

02:27:52 8 A. Yes.

02:27:53 9 Q. Sony does not permit Epic Direct Pay, does it?

02:27:58 10 A. Not on PlayStation.

02:28:00 11 Q. And Sony does not permit any alternative payment mechanism

02:28:04 12 on PlayStation; correct?

02:28:08 13 A. Correct. Noting that purchases made on other platforms

02:28:12 14 are still honored on PlayStation.

02:28:15 15 Q. You are now talking about cross-wallet-type transactions?

02:28:20 16 A. Yes.

02:28:20 17 Q. We will come back to that, sir. Thank you.

02:28:21 18 A. Sorry. No, I am referring to cross-progression. If you

02:28:23 19 buy an outfit on Xbox --

02:28:26 20 Q. All right. And let's be clear so the record is clear.

02:28:29 21 When you say the transactions on other platforms may be

02:28:33 22 honored in PlayStation, you're referring to cross-progression?

02:28:39 23 A. Yes. Progression of in-app ownership status rather than

02:28:44 24 currency.

02:28:44 25 Q. And you are not referring to currency purchased on other

platforms because Sony will not permit the use of currency bought on other platforms in Sony PlayStation, correct?

A. Yes.

Q. We'll get to that in a minute.

Turning to Xbox. The Xbox, of course, is owned by Microsoft?

A. Yes.

Q. And Epic Games has been distributing games through the Xbox since about 2006?

A. Yes.

Q. And Epic earned about \$3.5 billion from in-app purchases through *Fortnite* on Xbox; correct? And, again, that is through the end of 2020.

A. To my understanding it is roughly --

THE COURT: I couldn't hear you.

THE WITNESS: I am sorry. In my understanding, yes.

BY MR. DOREN:

Q. And Microsoft charges Epic a 30-percent commission on all in-app purchases; true?

A. On Xbox, yes. On Windows, no.

Q. On Xbox; correct, sir?

A. Yes.

Q. And Microsoft collects the money through its integrated commerce technology; correct?

A. On Xbox, yes.

02:29:53 1 Q. And it sends 70 percent of that money to Epic and keeps
02:29:57 2 the other 30 percent; right?

02:29:59 3 A. On Xbox, yes.

02:30:01 4 Q. And Microsoft does not permit sideloading on Xbox;
02:30:05 5 correct?

02:30:07 6 A. Right.

02:30:09 7 Q. And Microsoft requires that its integrated technology be
02:30:13 8 used for all in-app purchases; true?

02:30:16 9 A. Yes.

02:30:18 10 Q. And Microsoft does not permit an Epic Direct Pay option on
02:30:24 11 Xbox, does it?

02:30:26 12 A. No.

02:30:27 13 Q. And turning to the Nintendo Switch -- and *Fortnite* is
02:30:32 14 available on the Nintendo Switch?

02:30:35 15 A. Yes.

02:30:35 16 Q. We've seen it. That is a mobile device as well as one
02:30:39 17 that can be plugged into a television?

02:30:42 18 A. Yes.

02:30:43 19 Q. And that was released in the summer of 2018, the product
02:30:48 20 itself, the Switch; is that right?

02:30:50 21 A. I am sorry, I don't remember.

02:30:53 22 Q. Do you recall when *Fortnite* first became available on the
02:30:56 23 Nintendo Switch?

02:30:59 24 A. I believe that was late 2018.

02:31:02 25 Q. And Nintendo charges Epic a 30-percent commission on all

02:31:07 1 in-app transactions; correct?

02:31:09 2 **A.** Yes.

02:31:09 3 **Q.** And Nintendo does not permit sideloading; correct?

02:31:13 4 **A.** Correct.

02:31:14 5 **Q.** And Nintendo requires that its integrated commerce
02:31:19 6 technology be used for all in-app purchases; right?

02:31:23 7 **A.** Yes.

02:31:23 8 **Q.** It does not permit an Epic Direct Pay option, does it?

02:31:30 9 **A.** No.

02:31:31 10 **Q.** And through the end of 2020, Nintendo had accounted for
02:31:35 11 about \$1.1 billion of Epic *Fortnite* revenue; right?

02:31:42 12 **A.** I am not certain.

02:31:44 13 **Q.** And as to each of these contracts with Microsoft and Sony
02:31:47 14 and Nintendo, presumably you had lawyers review those
02:31:52 15 contracts; right?

02:31:53 16 **A.** Yes.

02:31:54 17 **Q.** And after evaluating their terms, you signed those
02:31:58 18 knowingly and willingly; correct?

02:32:00 19 **A.** Yes.

02:32:09 20 **MR. DOREN:** Your Honor, I do have some questions on
02:32:11 21 Samsung, but given the sealing order, perhaps I can work
02:32:14 22 around that and come back to it first thing in the morning
02:32:17 23 or --

02:32:19 24 **THE COURT:** That's fine.

02:32:19 25 **MR. DOREN:** -- end of the day. Whatever is best.

THE COURT: So let's just review it either at the beginning or at the end.

MR. DOREN: Thank you, Your Honor.

THE COURT: And it may be best to do it at the end of today so once we get the phone lines up, we don't have to worry about it.

How much time would that involve?

MR. DOREN: I'm going to say 15 minutes.

THE COURT: Okay.

MR. DOREN: Thank you.

BY MR. DOREN:

Q. Mr. Sweeney, as for Apple, Apple charges the same 30 percent commission as the others, as the other three platforms we just discussed. Correct?

A. Yes.

Q. And like all the others, other than Android, Apple does not permit sideloading, does it?

A. I'm sorry, can you repeat that?

Q. Sure.

On iOS, Apple does not permit sideloading, does it?

A. Correct.

Q. And so in that way, it is consistent with the other three platforms we discussed. Correct?

A. With respect to the items on this chart, yes.

Q. And in that vain, Apple's requirement that its integrated

02:33:30 1 technology be used for in-app purchases is consistent with the
02:33:33 2 other platforms we've discussed. Correct?

02:33:38 3 **A.** With respect to in-app purchases used for visual goods
02:33:42 4 that are consumed in-app, my understanding is yes.

02:33:45 5 **Q.** And the amount of revenue earned on in-app purchases by
02:33:52 6 Epic through the Apple App Store is less -- far less than Sony
02:34:00 7 or Microsoft and less than Nintendo as well, correct?

02:34:08 8 **A.** My rough understanding is that it is roughly half of the
02:34:11 9 revenue on Switch.

02:34:13 10 **Q.** Okay.

02:34:13 11 And earlier today you testified that a 30 percent
02:34:19 12 commission is really significant and has impacted Epic's
02:34:24 13 pricing decisions.

02:34:24 14 Do you recall that testimony?

02:34:26 15 **A.** Yes.

02:34:27 16 **Q.** And you have paid a 30 percent commission on over
02:34:32 17 \$12 billion that you have been -- that you have earned through
02:34:38 18 Sony, Microsoft, and Nintendo; correct?

02:34:45 19 **A.** In rough terms, yes.

02:34:47 20 **Q.** And so the impact of a 30-percent commission is far more
02:34:51 21 significant on Epic's pricing decisions based on those
02:34:56 22 platforms than anything to do with iOS through August 2020;
02:35:01 23 right?

02:35:05 24 **A.** Yes. With respect to current and past revenue, not with
02:35:12 25 respect to expectations of future revenue.

02:35:16 1 Q. The metaverse?

02:35:18 2 A. Yes, a billion-user platform if you can imagine it.

02:35:26 3 Q. Let's talk about *Fortnite* for a few minutes.

02:35:32 4 Fortnite was Epic's first game using in-app purchases;
02:35:35 5 right?

02:35:42 6 A. You know, I'm not certain. We may have introduced
02:35:46 7 Infinity Blade.

02:35:47 8 THE COURT: You are mumbling again.

02:35:50 9 THE WITNESS: I'm sorry. I am not certain, we may
02:35:52 10 have introduced them into Infinity Blade at some point.

02:35:56 11 BY MR. DOREN:

02:35:56 12 Q. We can agree first memorable game you've generated with
02:36:02 13 in-app purchases; right?

02:36:03 14 A. For me, yes.

02:36:06 15 Q. And we have not yet used the term "freemium" here.

02:36:12 16 Are you familiar with the term "freemium"?

02:36:15 17 A. Yes.

02:36:15 18 Q. And a freemium game is one that is free to download but
02:36:19 19 then payments or purchases can be made over the course of the
02:36:23 20 game or the experience?

02:36:25 21 A. Yes.

02:36:25 22 Q. And that's what *Fortnite* is, a freemium model game?

02:36:29 23 A. Yes.

02:36:29 24 Q. And it's this freemium model game that has made Epic Games
02:36:35 25 what it is today in terms of being an almost 30 billion-dollar

02:36:39 1 company; correct?

02:36:40 2 **A.** Yes. I attribute a lot of our success to our early
02:36:45 3 decision to make *Fortnite Battle Royale* available for free.

02:36:49 4 **Q.** So if the revenue comes in when *Battle Royale* is offered
02:36:55 5 for free with the opportunity to make in-app purchases;
02:36:57 6 correct?

02:36:59 7 **A.** Yes.

02:37:05 8 **Q.** Now Epic launched on Xbox, PlayStation, PCs, and Mac. Let
02:37:11 9 me start over.

02:37:11 10 Epic launched *Fortnite* on Xbox, PlayStation, PCs and Mac
02:37:17 11 in 2017; is that true?

02:37:20 12 **A.** Yes.

02:37:23 13 **Q.** And one thing I didn't hear much discussion of is how this
02:37:26 14 In-App Purchasing works within *Battle Royale* and in the
02:37:32 15 *Fortnite* environment. So let's talk about that for a moment.

02:37:35 16 There's something called V-Bucks; correct?

02:37:39 17 **A.** Yes.

02:37:39 18 **Q.** And a player will use, I believe you called them real
02:37:45 19 money transactions to purchase virtual currency in the form of
02:37:52 20 V-Bucks; correct?

02:37:53 21 **A.** Yes.

02:37:53 22 **Q.** And so a player of *Fortnite* will make a purchase using
02:38:00 23 real money to get this virtual currency, and then that virtual
02:38:04 24 currency is used to turn themselves into large bananas and to
02:38:08 25 ride on sharks?

02:38:09 1 **A.** Bananas yes, sharks no. Purchases made in *Fortnite* only
02:38:14 2 affect the appearance of your character and not their
02:38:18 3 capabilities in the game.

02:38:20 4 **Q.** Thank you. I appreciate that clarification.

02:38:22 5 So these V-Bucks, once purchased, are then used to
02:38:26 6 purchase skins and cosmetics and things within the *Fortnite*
02:38:30 7 environment?

02:38:31 8 **A.** Yes.

02:38:32 9 **Q.** So it's the sale of V-Bucks that generates the revenue for
02:38:36 10 Epic Games; correct?

02:38:39 11 **A.** Yes.

02:38:39 12 **Q.** And then it's the use of those V-Bucks on different skins
02:38:43 13 and cosmetics that bring the player back to spend more real
02:38:47 14 money purchasing more V-Bucks; correct?

02:38:51 15 **A.** Yes. If they like what they've gotten in the past, then
02:38:51 16 probably --

02:38:51 17 **THE COURT REPORTER:** I'm sorry?

02:38:51 18 **THE WITNESS:** I'm sorry. Yes.

02:38:58 19 **BY MR. DOREN:**

02:39:02 20 **Q.** And just as a quick aside, we talked about -- you talked
02:39:06 21 about, I'm sorry, some different concerts that had been held
02:39:10 22 in the *Fortnite* environment over the last couple of years.

02:39:13 23 Do you recall that testimony?

02:39:15 24 **A.** Yes.

02:39:16 25 **Q.** And one of the ways that you monetize those experiences is

02:39:19 1 by selling kind of thematic cosmetics to go along with the
02:39:26 2 concerts; correct?

02:39:27 3 **A.** Yes.

02:39:31 4 **Q.** What is the price range in real money for items that can
02:39:34 5 be purchased with V-Bucks?

02:39:38 6 **A.** My understanding is they will be between like \$1 and \$20
02:39:44 7 for stand-alone items. Then we have -- sometimes have bundles
02:39:49 8 of multiple items which can go up to, I believe, 30 or \$40. I
02:39:59 9 am not certain about all of the offers we've ever had.

02:40:04 10 **Q.** Some may have been more?

02:40:06 11 **A.** Possibly.

02:40:06 12 **Q.** What does it cost to Epic to generate a V-Buck, minting a
02:40:13 13 V-Buck?

02:40:14 14 **A.** There is no cost to a V-Buck. There's cost in developing
02:40:18 15 the software, but the V-Bucks themselves don't have a marginal
02:40:22 16 cost.

02:40:23 17 **Q.** And who sets the prices for the skins and cosmetics in
02:40:28 18 bundles?

02:40:29 19 **A.** The *Fortnite* team in general.

02:40:33 20 **Q.** In terms of roles, who's involved in that task?

02:40:40 21 **A.** Nowadays it's under the general responsibility of Epic
02:40:45 22 President Adam Sussman. And then we have a team of -- a
02:40:51 23 business team who works on individual pricing of individual
02:40:58 24 items.

02:41:05 25 **Q.** So in your testimony, you discussed how prices had risen

over the years as a result of this 30 percent commission.

Do you recall that topic generally?

A. Yes.

Q. The commission has remained the same over the years; correct?

A. 30 percent is still 30 percent.

Q. 30 percent has been 30 percent as really the industry standard from 2010 and before until today; correct?

A. 30 percent is most the prevalent rate charged by the stores, and it was then and it is now.

Q. So when we talk about the costs of cosmetics and skins and bundles rising, we are talking about pricing decisions made by the Epic team; correct?

A. Yes.

Q. Not any rising commission pressure from any of the platforms, much less iOS. True?

A. Correct.

With respect to these 30 percent commissions.

Q. Now, there was some discussion about cross-progression earlier. And just to make sure we have all of our different cross-disciplines well-defined here, cross-progression, as I understand it, is when a player plays on, for example, an iOS device and then later fires up *Fortnite* on their PC, and there they will find that their game progression and their identities and their purchases will all be there waiting for

02:42:56 1 them even though they are on a different device.

02:42:58 2 Do I have that right?

02:43:00 3 **A.** Yes.

02:43:05 4 **Q.** And cross-progression is important to Epic because a
02:43:09 5 significant percentage of *Fortnite* players play *Fortnite* on
02:43:13 6 more than one type of device; correct?

02:43:17 7 **A.** I'm not sure of the percentage of *Fortnite* players who
02:43:21 8 play on multiple devices.

02:43:21 9 **Q.** You know it's a significant fraction, don't you?

02:43:25 10 **A.** I don't know what fraction it is.

02:43:26 11 **Q.** Well, why don't we take a look -- let me ask you a couple
02:43:31 12 more questions first, actually.

02:43:32 13 You mentioned in your testimony the analytics group?

02:43:38 14 **A.** Yes.

02:43:38 15 **Q.** And what does the analytics group or team do for Epic?

02:43:44 16 **A.** They track the usage of our products through a variety of
02:43:48 17 metrics such as, in the case of *Fortnite*, play time, spending
02:43:56 18 dozens of others' statistics that help with development.

02:44:00 19 **Q.** And does that -- and you mentioned that that group
02:44:03 20 circulates periodic reports and updates, that sort of thing?

02:44:07 21 **A.** Yes.

02:44:07 22 **Q.** Do they use the Epic *Fortnite* user data in part to
02:44:11 23 generate those reports?

02:44:16 24 **A.** These are the result of aggregate data on usage only.

02:44:20 25 We -- our general philosophy is to track as little personal

02:44:24 1 data about our users as we absolutely need to run our
02:44:29 2 business.

02:44:29 3 Q. Because privacy is important to you.

02:44:31 4 A. Yes.

02:44:32 5 Q. And you don't want to do anything that will put your
02:44:38 6 users' privacy in peril; correct?

02:44:41 7 A. Yes.

02:44:41 8 Q. That is a personal concern of yours?

02:44:43 9 A. Yes.

02:44:47 10 Q. What I would like to do, sir, if I may, Your Honor, is
02:44:50 11 hand up a binder with some exhibits in it and then walk
02:44:54 12 through a few of them.

02:44:58 13 THE COURT: Can you give me the numbers, Mr. Doren?

02:45:00 14 MR. DOREN: Yes, Your Honor.

02:45:13 15 DX5535, Your Honor.

02:45:20 16 BY MR. DOREN:

02:45:21 17 Q. Mr. Sweeney, if you could please look at the tab for
02:45:21 18 DX5535, I think you will find these documents are in number
02:45:26 19 order.

02:45:30 20 THE COURT: Are you bringing it on the screen?

02:45:31 21 MR. DOREN: Yes.

02:45:44 22 Not that that's done us a lot of any good, Your Honor. We
02:45:57 23 will try to enlarge it on the screen.

02:46:00 24 BY MR. DOREN:

02:46:01 25 Q. Mr. Sweeney, do you have Exhibit 5535 in front of you?

02:46:06 1 **THE COURT:** Ms. Forrest, do you have an objection to
02:46:07 2 this document?

02:46:12 3 **MS. FORREST:** Your Honor, yes. Foundation.

02:46:17 4 **THE COURT:** All right. Go ahead.

02:46:18 5 **MR. DOREN:** Thank you, Your Honor.

02:46:19 6 **BY MR. DOREN:**

02:46:20 7 **Q.** Mr. Sweeney, you have this exhibit in front of you?

02:46:24 8 **A.** Yes.

02:46:24 9 **Q.** And do you recognize it as an Analytics Inside Weekly
02:46:29 10 Report from internally at Epic Games?

02:46:33 11 **A.** Yes.

02:46:34 12 **Q.** And what is an Analytics Inside Weekly Report at Epic?

02:46:40 13 **A.** This is a status report from the Analytics Team reporting
02:46:45 14 findings about various products.

02:46:48 15 **MR. DOREN:** Your Honor, I would move Exhibit 5535
02:46:52 16 into evidence.

02:46:53 17 **MS. FORREST:** No objection.

02:46:54 18 **THE COURT:** Admitted.

02:46:55 19 (Defendant's Exhibit 5535 received in evidence)

02:46:56 20 **BY MR. DOREN:**

02:46:56 21 **Q.** Mr. Sweeney, directing your attention to key insights from
02:47:01 22 analytics the past week at the very top.

02:47:05 23 Do you see that?

02:47:06 24 **A.** Yes.

02:47:06 25 **Q.** This is for the week of February 4, 2020; correct?

02:47:09 1 A. Yes.

02:47:10 2 Q. So this was a time when *Fortnite* was on iOS; correct?

02:47:15 3 A. Yes.

02:47:16 4 Q. And it was on Android but only through sideloading;

02:47:19 5 correct?

02:47:26 6 A. I'm not certain as of this date. We went into Google Play

02:47:30 7 at some point in early 2020, but I'm not sure when.

02:47:34 8 Q. Fair enough.

02:47:35 9 And the analytics group states in the first bullet

02:47:39 10 point -- sorry, the second bullet point: The *Fortnite* players

02:47:43 11 who play on mobile are the most likely to play on other

02:47:46 12 platforms.

02:47:47 13 First of all, do you agree with that statement?

02:47:52 14 A. I don't have any independent understanding of it.

02:47:55 15 Q. Okay.

02:47:55 16 And your analytics group reported for the week -- on

02:48:00 17 February 4, 2020 that *Fortnite* players who play on mobile are

02:48:04 18 the most likely to play on other platforms then (approximately

02:48:09 19 38 percent).

02:48:10 20 Do you see that?

02:48:11 21 A. Yes.

02:48:11 22 Q. And would you expect your analytics group to be

02:48:14 23 circulating accurate information to you and others?

02:48:17 24 A. I'm not sure if this is circulated to me, but generally I

02:48:22 25 would, but I don't know the nature of this statistic.

02:48:26 1 Q. But, sir, when the analytics group sent around an
02:48:30 2 analytics insight weekly report, you expected it to be
02:48:33 3 accurate, correct?

02:48:34 4 A. I would be very upset if it was not accurate.

02:48:38 5 Q. You expected your employees to be able to rely on this
02:48:40 6 type of document in performing their jobs; correct?

02:48:43 7 A. Yes.

02:49:01 8 Q. Now, another feature of *Fortnite* that you discussed with
02:49:05 9 counsel was the fact that different players on different
02:49:10 10 devices could play with each other.

02:49:11 11 Do you remember that?

02:49:13 12 A. Yes.

02:49:13 13 Q. What do you call that?

02:49:16 14 A. That's called cross-play or cross-platform play.

02:49:19 15 Q. And it's your understanding that where you have
02:49:23 16 cross-platform play, the players tend to stay longer on the
02:49:27 17 game?

02:49:27 18 A. Yes.

02:49:28 19 Q. And when there's cross-platform play, the players tend to
02:49:32 20 make more purchases and spend more money within the *Fortnite*
02:49:36 21 environment; correct?

02:49:37 22 A. Yes.

02:49:39 23 Q. And so the cross-platform play is good for Epic's bottom
02:49:49 24 line, correct?

02:49:50 25 A. Yes.

02:49:50 1 Q. And *Fortnite* also permits players to buy V-Bucks on one
02:49:55 2 transaction platform and then use the currency on another. We
02:49:59 3 talked about this as cross-wallet; is that correct?

02:50:01 4 A. Yes. We support that to the extent that the various
02:50:04 5 platforms allow it.

02:50:06 6 Q. So, in that instance, with a player purchases V-Bucks on
02:50:11 7 their Xbox, those same V-Bucks could be used by that player
02:50:14 8 when they play *Fortnite* on their iPhone or iPad; correct?

02:50:20 9 A. I'm sorry, I missed the first part of the question.

02:50:22 10 Q. No worries. No worries.

02:50:24 11 If a player purchases V-Bucks on their Microsoft Xbox,
02:50:28 12 they could then use those V-Bucks in playing on their iOS
02:50:33 13 device, at least before August 2020.

02:50:36 14 A. Yes, that's correct.

02:50:42 15 Q. And when V-Bucks are purchased on one transaction platform
02:50:45 16 then used on another, only one of those platforms receive a
02:50:49 17 commission from Epic; correct?

02:50:52 18 A. Yes.

02:50:53 19 Q. And that's the platform on which the V-Bucks were
02:50:56 20 purchased; true?

02:50:58 21 A. Yes.

02:50:58 22 Sorry. With one exception. In the case of Sony
02:51:03 23 PlayStation in which Sony's terms provide that in certain
02:51:10 24 circumstances Epic would have to pay an additional revenue to
02:51:14 25 Sony.

02:51:14 1 Q. Now, Sony doesn't permit cross-wallet transactions, does
02:51:18 2 it?

02:51:21 3 A. No. Sony does not permit cross-wallet transactions.

02:51:24 4 Q. What you are referring to is that before Sony would agree
02:51:30 5 to cross-platform play, they required Epic to agree that if
02:51:34 6 people started playing too much on other platforms rather than
02:51:38 7 their Playstations, that Epic would pay them compensation for
02:51:43 8 that; correct?

02:51:44 9 A. Was the first word in your sentence "play" or "pay?"

02:51:52 10 Q. I wish I could tell you. Let me try again.

02:51:55 11 Mr. Sweeney, under Epic's contract with Sony, it must pay
02:52:05 12 Sony if -- for cross-platform play if the cross-platform play
02:52:11 13 starts waiting too much towards other platforms among
02:52:15 14 PlayStation users; correct?

02:52:20 15 A. Not exactly. Sony has a policy that requires if the ratio
02:52:27 16 of payments of cross-platforms were given, PlayStation users
02:52:33 17 gets out of sync with the play time, then we would have to pay
02:52:37 18 them commission on other platform revenue.

02:52:41 19 So if somebody primarily were playing on PlayStation but
02:52:46 20 paying on iPhone, then this might trigger compensation to
02:52:50 21 Sony.

02:52:50 22 Q. So to summarize the Sony issue, as you mentioned in your
02:52:53 23 direct testimony, Sony did not originally agree to permit
02:52:57 24 cross-platform play; correct?

02:53:00 25 A. Yes. As of early 2017, Sony did not permit cross-platform

02:53:06 1 play with mobile devices or other consoles.

02:53:14 2 **Q.** So, in order -- so over the course of negotiating an
02:53:18 3 agreement through which Sony agreed to cross-platform play,
02:53:24 4 Epic had to agree to pay an additional commission to Sony
02:53:28 5 under certain circumstances; correct?

02:53:30 6 **A.** Yes.

02:53:31 7 **Q.** On top of the 30 percent that Sony was already taking
02:53:34 8 before sending Sony -- before sending Epic the 70 percent
02:53:38 9 balance; correct?

02:53:39 10 **A.** Yes.

02:53:40 11 **THE COURT:** So I just have a notice that we might
02:53:54 12 have lost the public line. Given that we might have just lost
02:53:58 13 the public line, perhaps now is a good time to deal with the
02:54:03 14 sealed issues.

02:54:05 15 **MR. DOREN:** Thank you, Your Honor.

02:54:07 16 **THE COURT:** And it's -- we would have done it about
02:54:10 17 now anyway. Let me say a couple of things before we go into
02:54:13 18 the sealed session.

02:54:15 19 One is, for those reporters and, I guess, Mr. Rodriguez if
02:54:24 20 you are still here, yes, coming tomorrow and both of the trial
02:54:30 21 teams, we are picking a jury in this courthouse tomorrow. And
02:54:35 22 that means the lines will be very long to get into the
02:54:38 23 courthouse. Courthouse doors open at 7:00 a.m. And I
02:54:42 24 understand you all have conference rooms. I would suggest
02:54:45 25 that you come early so that we can get started on time.

02:54:52 1 So that's just an FYI.

02:54:53 2 The second thing, housekeeping -- and I think this worked,
02:54:58 3 I don't know I left the bench, but when we take our 40-minute
02:55:05 4 break, these courtrooms get sealed. I would ask all of the
02:55:11 5 lawyers to leave so that my staff can actually leave the
02:55:14 6 courtroom and have their lunch and, you know, do what they
02:55:18 7 need to do. So if you would make sure to leave so they can
02:55:21 8 get their break as well.

02:55:24 9 I think those were the two housekeeping issues.

02:55:28 10 Also, I don't expect that you all want to hang around the
02:55:31 11 courthouse very long after proceedings, but because of the
02:55:36 12 number of restrictions we have happening, you really shouldn't
02:55:41 13 be here past 4:30. The courthouse doors get locked and it's
02:55:45 14 going to be difficult for you to get out. So at the end of
02:55:48 15 the day, you may want to transition to whatever war rooms you
02:55:54 16 might have.

02:55:54 17 Do you have any questions on those logistical issues?

02:55:57 18 **MS. FORREST:** Your Honor, I have one question. In
02:55:58 19 terms of the overnight, should we clear everything out?

02:56:02 20 **THE COURT:** No, you don't need to. I have cleared my
02:56:05 21 calendars. No one else is coming in here. Everything I'm
02:56:09 22 going to do is by Zoom. I have a criminal calendar here at
02:56:13 23 3:30, which will mean we will finish on time, but you can
02:56:19 24 leave all of your stuff.

02:56:20 25 **MS. FORREST:** Thank you.

02:56:22 1 **THE COURT:** Okay. Anything else?

02:56:24 2 All right. If not, at this point, we will go into sealed
02:56:27 3 session so I'll ask that the phone lines be moved out.

02:56:33 4 Those members of the public that are in the courtroom,
02:56:36 5 Ms. Nysten, Ms. Griffith, Mr. Rodriguez, Ms. Behringer thank
02:56:45 6 you for your patience and participation today, and I would ask
02:56:48 7 that you leave the courtroom.

02:56:55 8 (Members of the public leave the courtroom.)

02:57:46 9 **THE COURT:** We need to seal the courtroom.

02:57:48 10 The courtroom is sealed.

02:57:50 11 (Sealed portion of the transcript continued on next page.)
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(Proceedings held in open court.)

THE COURT: This is what I need to have happen. I take it 3620 is offered?

MR. DOREN: Thank you, Your Honor. Yes.

THE COURT: Any objection?

MS. FORREST: Yes, Your Honor.

What I would suggest is that there is a portion of the email from Mr. Roh that's on the second page that's hearsay, hearsay for Mr. Roh and there's no non-hearsay basis for some of the statements in that letter.

Apart from that, Your Honor, we don't have any objection to the remainder.

MR. DOREN: Your Honor, it's not offered for the truth. It is Mr. Roh's negotiating position with Epic.

THE COURT: I will admit it for its non-hearsay purpose.

(Defendant's Exhibit 3620 (under seal) received in evidence)

THE COURT: Okay. It's admitted. Here's the thing about 3620 which is, yesterday I issued an order which indicated what portion of it was sealed. It was significantly less than was discussed in this courtroom.

It appears to me that not all of the examination should be sealed, and I would ask the parties to provide -- to meet and confer with respect to the transcript on the sealed portion, and only -- I will decide if you can't, but there's only a

03:13:05 1 very little piece of that that I think that needs to be
03:13:08 2 sealed, and the remainder will then be unsealed.

03:13:11 3 I think it is easier to do it when we have the transcript.
03:13:17 4 So you should do that tonight once you get it and we can talk
03:13:22 5 about it tomorrow.

03:13:23 6 **MR. DOREN:** Thank you, Your Honor. I didn't want to
03:13:24 7 take any risk --

03:13:26 8 **THE COURT:** I agree. I appreciate it. Like I said,
03:13:28 9 it's easier to open it up afterwards.

03:13:32 10 **MR. BORNSTEIN:** Excuse me, Your Honor, if I may. We
03:13:33 11 will need to bring Samsung into that discussion as well
03:13:36 12 because I do believe they requested to seal some of that
03:13:40 13 document as well. We will do that.

03:13:42 14 **THE COURT:** That's fine. I know what I sealed, and
03:13:45 15 you can expect that I am not going to seal what I've already
03:13:50 16 said is not sealed.

03:13:52 17 **MR. BORNSTEIN:** Of course.

03:13:53 18 **THE COURT:** Okay.

03:13:55 19 I think given the time, and my staff needs a break. So we
03:13:59 20 are going to go off the record and adjourn for the day.

03:14:03 21 We will start again tomorrow at 8:00 a.m.

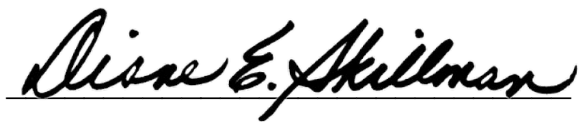
03:14:05 22 Okay. We are off the record.

03:14:07 23
03:14:07 24 (Proceedings concluded at 3:14 p.m.)
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CERTIFICATE OF REPORTER

I, Diane E. Skillman, Official Reporter for the
United States Court, Northern District of California, hereby
certify that the foregoing is a correct transcript from the
record of proceedings in the above-entitled matter.



DIANE E. SKILLMAN, CSR 4909, RPR, FCRR

Monday, May 3, 2021